163 U.S. 504

163-504

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 841.

JOHN H. WARD, SHERIFF OF THE COUNTY OF UINTA, IN THE STATE OF WYOMING, APPELLANT,

vs.

RACE HORSE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

FILED JANUARY 9, 1896.

(16,131.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 9, 1896.

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1 In the Supreme Court of the United States.

JOHN H. WARD, as Sheriff of Uinta County, Wyoming, Appellant,
vs.
RACE HORSE, Appellee.

Transcript of Record on Appeal from the Circuit Court of the United States for the District of Wyoming.

2 Be it remembered that on the seventh day of October, A. D. 1895, there was filed in the office of the clerk of the circuit court of the United States for the district of Wyoming a petition for a writ of *habeas corpus* on behalf of Race Horse, bearing an endorsement of allowance written thereon by the judge of said court; which petition, with the endorsement of allowance thereon, is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *District of Wyoming*, } ss:

In the Circuit Court of the United States within and for the District of Wyoming, in the Eighth Judicial Circuit.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus*.

To the honorable the circuit court of the United States in and for the district of Wyoming:

Your petitioner, Race Horse, respectfully represents and shows to this honorable court that he is a Bannock Indian and a member of that certain tribe of Bannock Indians which entered into and concluded a treaty with the United States of America at Fort Bridger, in the Territory of Utah, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight; that he resides at and upon what is known as the Fort Hall Indian reservation, situate in the eastern part of the State of Idaho.

He further represents and shows to this honorable court that he was born a member of said tribe of Bannock Indians; that he was a member thereof at the time of the making of said treaty as aforesaid, and has been at all times and still is a member thereof, and has at all times mentioned herein entertained and maintained tribal relations with said Bannock tribe of Indians.

3 He further represents to this honorable court that he is unjustly, unlawfully, and in violation of the Constitution of the United States and in violation of article IV of the aforesaid treaty restrained of his liberty and held in custody by John H. Ward, the sheriff of Uinta county, in the State of Wyoming, at Evanston, in said county, by virtue of a warrant of commitment issued out of and under the seal of the district court of the third judicial district of the State of Wyoming, within and for the county

of Uinta, in said State, a true copy of said warrant of commitment being hereto attached and made a part hereof.

Your petitioner further represents to this honorable court that on the 3rd day of October, A. D. 1895, one John C. Hamm, the county and prosecuting attorney of the county of Uinta, in the State of Wyoming, filed in the district court of the third judicial district within and for the county of Uinta, in the State of Wyoming, an information, in writing, charging that your petitioner did, on the first day of July, A. D. 1895, at the county of Uinta, in the State of Wyoming, seven elk unlawfully, wantonly, and in excess of the number he could immediately use for food purposes take, capture, destroy, and kill, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Wyoming, a true copy of which information and complaint is attached hereto and made a part hereof.

That thereupon a warrant was issued out of the clerk's office of said district court, and under the seal thereof, for the arrest of your petitioner upon said information and complaint; that thereafter, upon said warrant, your petitioner was arrested and brought before the clerk of said district court, and your petitioner was held by said clerk in the sum of five hundred ($500.00) dollars bail for his appearance before said district court on the first day of the next term thereof, and, your petitioner failing to give said bail, he was,
4 in default thereof, by said clerk committed to the custody of the sheriff of said county of Uinta, to be by him safely kept until discharged by due process of law, all of which will appear from the copy of the information and complaint and the copy of the commitment hereto attached.

Your petitioner further represents and shows to this honorable court that it is true as charged in said complaint that he did pursue, hunt, and kill said seven elk mentioned in said information and complaint; that he killed the said seven elk at a point about twenty miles southeast of Mount Hoback, in Uinta county, in the State of Wyoming, on or about the first day of July, A. D. 1895; that the said place where he killed said seven elk was about sixty miles distant from any ranch or settlement of any kind whatsoever, and was upon the unoccupied lands of the United States of America; that there were no occupied lands or settled lands nearer than sixty miles to the point where said act of killing was done; that at the time of said killing there was wild game in abundance in and upon the lands where said act of killing was done and in the immediate vicinity of said point; that the said lands over which he was at said time hunting constituted and were lands over which the said tribe of Indians had for a great many years last past been in the habit of hunting over and upon; that along and on the borders of said hunting district and of said lands over which the said Indians had as aforesaid been in the habit of hunting peace between the whites and Indians had for many years subsisted and was subsisting and did subsist at the time your petitioner was so as aforesaid hunting thereon and at the time he killed the said seven elk mentioned in said complaint.

He further admits that the seven elk so as aforesaid killed by him at said time and place were in excess of the number he could immediately use for food purposes, but he alleges the fact to
5 be that he killed the said seven elk solely for the purpose of furnishing means of subsistence for himself and his family and other members of said tribe of Bannock Indians, saving, curing, and preserving the meat of the animals so killed, so that it might be and constitute a food supply for the use of himself, his family, and others of said Bannock tribe of Indians during the winter following said time of killing.

Your petitioner further shows that in and by article IV of the said treaty hereinbefore mentioned it is provided as follows:

"Art. IV. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations, named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they will have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

That the said complaint and information, to answer which your petitioner is now unlawfully and wrongfully held in custody, is based upon an act of the legislature of the State of Wyoming approved February 20th, A. D. 1895, and being entitled "An act for the protection of game and fish," the same being chapter 98 of the Session Laws of Wyoming of 1895, and being found in the published volume of said Session Laws, at pages 225 to 233 thereof.

Your petitioner further shows that his detention, restraint, and imprisonment as aforesaid is illegal, in this, to wit, that under and by virtue of the aforesaid treaty provision your petitioner had the right under the Constitution and laws of the United States to hunt and kill said seven elk upon said unoccupied lands of the United States, and that the said right was a right guaranteed to your petitioner by the laws and Constitution of the United States; that the said act of the legislature of the State of Wyoming, in so far as it in any manner whatsoever relates to your petitioner, was and is wholly and absolutely null and void, as being in derogation
6 of and contrary to the provisions of the aforesaid treaty, and especially to the provision hereinbefore mentioned as article IV of said treaty.

Wherefore, to be relieved of said unlawful detention, imprisonment, and restraint, your petitioner prays that a writ of *habeas corpus*, to be directed to the said John H. Ward, sheriff of the county of Uinta, in the State of Wyoming, may issue in this behalf, so that your petitioner may be forthwith brought to this court to do, submit to, and receive what the law may direct.

RACE HORSE,
By GIBSON CLARK,
U. S. Attorney and Attorney for said Petitioner.

UNITED STATES OF AMERICA, } ss:
District of Wyoming, }

Gibson Clark, being first duly sworn, on his oath deposes and says that he is the attorney of the United States for the district of Wyoming; that he is the attorney for Race Horse, the petitioner named in the foregoing petition; that he subscribed the said petition on behalf of said Race Horse; that he has read the said petition and knows the contents thereof, and the statements therein made are true, as he verily believes.

GIBSON CLARK.

Subscribed and sworn to before me this 7th day of October, A. D. 1895.

[SEAL.] LOUIS KIRK, *Clerk.*

7 The State of Wyoming to the sheriff of Uinta county, Greeting:

Whereas Race Horse, an Indian not in the Indian country and a fugitive from justice, has been arrested on an information in writing filed in the district court in and for the county of Uinta, in the State of Wyoming, signed and sworn to by John C. Hamm, county and prosecuting attorney in and for the county aforesaid, charging that the said Race Horse, on the 1st day of July, A. D. 1895, in the county of Uinta, State of Wyoming, seven elk unlawfully, wantonly, and in excess of the number he could immediately use for food purposes did take, capture, kill, and destroy; and whereas, upon the filing of the information aforesaid, the said Race Horse was required by me to give bail in the sum of five hundred dollars for his appearance before the district court of said county on the first day of the next term thereof; and whereas he has failed to give said bail: Therefore, in the name of the State of Wyoming, you are commanded to receive the said Race Horse into your custody and him safely keep until discharged by due process of law.

Given under my hand and the seal of said court, at
[SEAL.] Evanston, Wyoming, on this 3rd day of October, A. D. 1895.

JOHN W. SAMMON,
Clerk Third District Court.

8 I hereby certify that I received the within writ on the 3rd day of October, A. D. 1895, and served the same on the same day by taking into my custody the said Race Horse and have him now subject to the order of court.

JOHN H. WARD,
Sheriff Uinta County.

I certify that the within is a true and correct copy of the original commitment in this case.

JOHN H. WARD, *Sheriff.*

No. 88. The State of Wyoming *vs.* Race Horse. Commitment. Filed Oct. 3rd, 1895, A. D. John W. Sammon, clerk.

9 *Information.*

THE STATE OF WYOMING, } ss.
County of Uinta, }

In the District Court in and for said County.

Comes now John C. Hamm, county and prosecuting attorney of the county of Uinta, in the State of Wyoming, and in the name and by the authority of the State of Wyoming informs the court and gives the court to understand that Race Horse, a fugitive from justice, an Indian not in the Indian country, late of the county aforesaid, on the first day of July, A. D. 1895, at the county of Uinta, in the State of Wyoming, seven elk unlawfully, wantonly, and in excess of the number he could immediately use for food purposes did take, capture, destroy, and kill, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Wyoming.

JOHN C. HAMM,
County and Prosecuting Attorney of the County of Uinta, in the State of Wyoming.

THE STATE OF WYOMING, } ss:
County of Uinta, }

I, John W. Sammon, clerk of the third judicial district court within and for said county and State aforesaid, do hereby certify the foregoing to be a full, true, and complete copy of the original now on file in said court.

In testimony whereof I have hereunto subscribed my hand and affixed the official seal of said court, at my office, in
[SEAL.] Evanston, Wyoming, this 5th day of October, A. D. 1895.

JOHN W. SAMMON,
Clerk Third Judicial District.

10 THE STATE OF WYOMING, } ss:
County of Uinta, }

I, John C. Hamm, county and prosecuting attorney of the county of Uinta, in the State of Wyoming, do solemnly swear that I have read the above and foregoing information by me subscribed; that I know the contents thereof, and that I have been reliably informed and verily believe the facts therein stated are true, so help me God.

JOHN C. HAMM.

Sworn to before me and signed in my presence this 3rd day of October, A. D. 1895, and I do hereby certify.

JOHN W. SAMMON,
[SEAL.] *Clerk Uinta County, Wyoming.*

Bail fixed at $500.00. John W. Sammon, clerk. No. 88. In district court, Uinta county. The State of Wyoming *vs.* Race Horse.

Information for killing game. Witnesses: ——— ———. Prosecuting witness, ———. John C. Hamm, county and prosecuting att'y. Filed this 3rd day of Oct., A. D. 1895. John W. Sammon, clerk Uinta county.

Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before the United States circuit court for the district of Wyoming, on Saturday, October 26th, 1895.

JOHN A. RINER, *Judge.*

And be it further remembered that thereafter and on the said seventh day of October, A. D. 1895, being one of the regular days of the May, 1895, term of said court, the following proceedings were had in said court in said cause and were duly entered of record, to wit:

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Now, on this day, comes Gibson Clark, Esquire, attorney for the United States, and presents to the court the application of Race Horse for a writ of *habeas corpus;* and the court, being fully advised in the premises, grants said application and endorses on said application the following, to wit:

"Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before the United States circuit court for the district of Wyoming, on Saturday, October 26th, 1895.

JOHN A. RINER, *Judge.*"

And be it further remembered that thereafter and on the said seventh day of October, A. D. 1895, the following writ of *habeas corpus* was issued out of said court in said cause, to wit:

THE UNITED STATES OF AMERICA, }
District of Wyoming. }

The President of the United States of America to John H. Ward, sheriff of Uinta county, Wyoming, Greeting:

We command you that you have the body of Race Horse, by you unlawfully deprived of his liberty, as is alleged, together with the cause of his detention, before our circuit court of the United States for the district of Wyoming, at the United States court-room, in the city of Cheyenne, in said district, on the twenty-sixth day of October, A. D. 1895, at the hour of ten o'clock a. m., then and there to be dealt with according to law; and have you then and there this writ.

13 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of [SEAL.] the said circuit court, at the city of Cheyenne, in said district, this seventh day of October, A. D. 1895, and of the Independence of the United States the 120th year.

LOUIS KIRK, *Clerk.*

And be it further remembered that thereafter and on the twenty-sixth day of October, A. D. 1895, being one of the regular days of the May, 1895, term of said court, the following proceedings were had in said court in said cause and were duly entered of record therein, to wit:

UNITED STATES OF AMERICA, }
District of Wyoming. }

In the Circuit Court.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Order.

Now, on this day, comes the respondent, John H. Ward, by Benjamin F. Fowler, Esqr., his attorney; also comes the 14 petitioner, by Gibson Clark, his attorney, and upon application of said respondent the petitioner, by his attorney thereto consenting, it is by the court ordered that the hearing of said cause be, and it is hereby, continued until the second day of November, A. D. 1895, and time is given to said respondent until said day in which to make return to the order hereinbefore entered.

JOHN A. RINER, *Judge.*

And be it further remembered that thereafter and on the second day of November, A. D. 1895, the following return was filed in said cause in the office of the clerk of said court by the respondent, John H. Ward, as sheriff of Uinta county, Wyoming, to wit:

THE UNITED STATES OF AMERICA, }
District of Wyoming. }

The President of the United States of America to John H. Ward, sheriff of Uinta county, Wyoming, Greeting:

We command you that you have the body of Race Horse, by you unlawfully deprived of his liberty, as is alleged, together with the cause of his detention, before our circuit court of the United States for the district of Wyoming, at the United States court-room, in the city of Cheyenne, in said district, on the twenty-sixth day of 15 October, A. D. 1895, at the hour of ten o'clock a. m., then and there to be dealt with according to law; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Cheyenne, in said district, this seventh day of October, A. D. 1895, and of the Independence of the United States the 120th year.

[SEAL.]

LOUIS KIRK, *Clerk.*

In the Circuit Court of the United States for the District of Wyoming.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Return to Writ of Habeas Corpus.

To the honorable the circuit court of the United States for the district of Wyoming:

I, John H. Ward, the sheriff of the county of Uinta, in the State of Wyoming, by way of return to the writ of *habeas corpus* issued to me in the above-entitled cause, do hereby certify that before the service and delivery to me of the said writ, issued in the above-entitled cause, the said Race Horse was committed to my custody by virtue of a certain warrant of commitment under the hand and seal of the clerk of the district court of the county of Uinta, in the State of Wyoming, a copy of which said warrant of commitment is hereto attached, marked "Exhibit A," and is hereby made a part hereof.

16

I do further certify that the said warrant of commitment was duly and regularly issued upon a criminal information, theretofore duly and regularly made, presented and filed in the said district court of the county of Uinta, in the State of Wyoming, by the county and prosecuting attorney of said county, a copy of which criminal information is hereto attached and marked "Exhibit B," and is hereby made a part hereof.

And I do further certify that at the time of the service upon me of the said writ of *habeas corpus* herein I did hold and detain and do still hold and detain the said Race Horse in my custody under and in pursuance of the command of the said warrant of commitment and not otherwise.

And I do further certify that the accusation and charge made against the said Race Horse, as in said criminal information is shown, is still depending and not disposed of in the said district court of the said county of Uinta.

And I do further certify that the cause of my detention of the said Race Horse is that he may be before the said district court of the said county of Uinta at the next term thereof, to wit, on the first Monday in April, A. D. 1896, then and there to answer the charge and accusation made in the said criminal information.

And I do admit that the said petitioner, Race Horse, is a Bannock Indian and a member of that certain tribe of Bannock Indians which entered into and concluded a treaty with the United

States of America at Fort Bridger, in the Territory of Utah, on the third day of July, A. D. 1868, and that he resides at and
17 upon what is known as the Fort Hall Indian reservation, situate in the eastern part of the State of Idaho, which said reservation is situate about sixty miles westerly from the western boundary line of the State of Wyoming and about one hundred miles westerly from the place of the commission of the offense with which the said Race Horse is charged as aforesaid.

And I do further admit that the said Race Horse was born a member of said tribe of Bannock Indians; that he was a member thereof at the time of the making of said treaty, as aforesaid, and has been at all times and still is a member thereof, and has at all times mentioned herein and in the said petition or application entertained and maintained tribal relations with said Bannock tribe of Indians.

And I further admit that the said offense with which the said Race Horse is charged as aforesaid was committed in the county of Uinta, in the State of Wyoming, at a point about twenty (20) miles southeast of Mount Hoback, in the said county of Uinta, on or about the first day of July, A. D. 1895, and that the said offense with which the said Race Horse is charged as aforesaid was committed on public lands of the United States of America which have not been entered under the land laws of the United States and which have not been settled upon.

But I do allege that the public lands of the United States at that place and in the vicinity thereof have been surveyed, subdivided, and platted by the United States and had been so surveyed, subdivided, and platted long before the time of the commission of said offense, and that at the time of the commission of said offense and long before then and ever since then the said lands were open to entry and settlement under the land laws of the United States.

And I further allege that a considerable portion of the public land of the United States in the near vicinity of the place
18 where the said offense was committed, to wit, within five (5) miles thereof, had been before the time of the commission of said offense settled upon and duly entered under the land laws of the United States and were occupied and used by the persons making such settlements and entries as homes and places of abode for themselves and their families.

And I do further allege that the place where the said offense was committed and the country adjacent thereto at the time of the commission of said offense constituted a part of the State of Wyoming and a part of the said county of Uinta and was included in and constituted a part of the school districts and election districts into which the said county had been theretofore and was then duly and regularly subdivided pursuant to the laws of the State of Wyoming.

And I do further allege that the lands at the place where the said offense was committed and in the country adjacent thereto, which were not then enclosed and fenced by settlers and entrymen thereon, were at the time of the commission of said offense used as an open

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of [SEAL.] the said circuit court, at the city of Cheyenne, in said district, this seventh day of October, A. D. 1895, and of the Independence of the United States the 120th year.

LOUIS KIRK, *Clerk.*

In the Circuit Court of the United States for the District of Wyoming.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Return to Writ of Habeas Corpus.

To the honorable the circuit court of the United States for the district of Wyoming:

I, John H. Ward, the sheriff of the county of Uinta, in the State of Wyoming, by way of return to the writ of *habeas corpus* issued to me in the above-entitled cause, do hereby certify that before the service and delivery to me of the said writ, issued in the above-entitled cause, the said Race Horse was committed to my custody by virtue of a certain warrant of commitment under the
16 hand and seal of the clerk of the district court of the county of Uinta, in the State of Wyoming, a copy of which said warrant of commitment is hereto attached, marked "Exhibit A," and is hereby made a part hereof.

I do further certify that the said warrant of commitment was duly and regularly issued upon a criminal information, theretofore duly and regularly made, presented and filed in the said district court of the county of Uinta, in the State of Wyoming, by the county and prosecuting attorney of said county, a copy of which criminal information is hereto attached and marked "Exhibit B," and is hereby made a part hereof.

And I do further certify that at the time of the service upon me of the said writ of *habeas corpus* herein I did hold and detain and do still hold and detain the said Race Horse in my custody under and in pursuance of the command of the said warrant of commitment and not otherwise.

And I do further certify that the accusation and charge made against the said Race Horse, as in said criminal information is shown, is still depending and not disposed of in the said district court of the said county of Uinta.

And I do further certify that the cause of my detention of the said Race Horse is that he may be before the said district court of the said county of Uinta at the next term thereof, to wit, on the first Monday in April, A. D. 1896, then and there to answer the charge and accusation made in the said criminal information.

And I do admit that the said petitioner, Race Horse, is a Bannock Indian and a member of that certain tribe of Bannock Indians which entered into and concluded a treaty with the United

States of America at Fort Bridger, in the Territory of Utah, on the third day of July, A. D. 1868, and that he resides at and
17 upon what is known as the Fort Hall Indian reservation, situate in the eastern part of the State of Idaho, which said reservation is situate about sixty miles westerly from the western boundary line of the State of Wyoming and about one hundred miles westerly from the place of the commission of the offense with which the said Race Horse is charged as aforesaid.

And I do further admit that the said Race Horse was born a member of said tribe of Bannock Indians; that he was a member thereof at the time of the making of said treaty, as aforesaid, and has been at all times and still is a member thereof, and has at all times mentioned herein and in the said petition or application entertained and maintained tribal relations with said Bannock tribe of Indians.

And I further admit that the said offense with which the said Race Horse is charged as aforesaid was committed in the county of Uinta, in the State of Wyoming, at a point about twenty (20) miles southeast of Mount Hoback, in the said county of Uinta, on or about the first day of July, A. D. 1895, and that the said offense with which the said Race Horse is charged as aforesaid was committed on public lands of the United States of America which have not been entered under the land laws of the United States and which have not been settled upon.

But I do allege that the public lands of the United States at that place and in the vicinity thereof have been surveyed, subdivided, and platted by the United States and had been so surveyed, subdivided, and platted long before the time of the commission of said offense, and that at the time of the commission of said offense and long before then and ever since then the said lands were open to entry and settlement under the land laws of the United States.

And I further allege that a considerable portion of the public land of the United States in the near vicinity of the place
18 where the said offense was committed, to wit, within five (5) miles thereof, had been before the time of the commission of said offense settled upon and duly entered under the land laws of the United States and were occupied and used by the persons making such settlements and entries as homes and places of abode for themselves and their families.

And I do further allege that the place where the said offense was committed and the country adjacent thereto at the time of the commission of said offense constituted a part of the State of Wyoming and a part of the said county of Uinta and was included in and constituted a part of the school districts and election districts into which the said county had been theretofore and was then duly and regularly subdivided pursuant to the laws of the State of Wyoming.

And I do further allege that the lands at the place where the said offense was committed and in the country adjacent thereto, which were not then enclosed and fenced by settlers and entrymen thereon, were at the time of the commission of said offense used as an open

and common grazing ground for the grazing of live stock by citizens of the State of Wyoming and citizens of other States who had and owned live stock in large numbers at that time grazing, running, and ranging thereon.

And I do further certify that the place where the said offense was committed and the country adjacent thereto was, in the year A. D. 1895, and in other years previous thereto, divided into round-up districts pursuant to the laws of the State of Wyoming, and that the cattle ranging thereon were in the said year 1895 and other years previous thereto rounded-up, gathered, and handled according to the long-established custom prevailing upon such round-ups and pursuant to the laws of said State.

And I do admit that at the time of the commission of said
19 offense peace between the white persons residing in the vicinity of the place of the commission of the said offense and the said Bannock Indians and all other Indians had for many years subsisted and was then subsisting.

And by reason of the matters and things aforesaid I deny that the said Race Horse is or has been unlawfully or wrongfully held in custody. Nevertheless, the body of the said Race Horse I have now here before this honorable court, as in said writ of *habeas corpus* commanded, to be dealt with according to law; and herewith I return the said writ of *habeas corpus* with this my return thereto.

Dated this second day of November, A. D. 1895.

JOHN H. WARD,
Sheriff of Uinta County, Wyoming

THE STATE OF WYOMING, }
County of Laramie, } ss:

John H. Ward, being first duly sworn, upon his oath deposes and says—

That he is the person who makes the foregoing return; that he has read the said return and knows the contents thereof, and that the matters and things therein certified and alleged are true as he verily believes.

JOHN H. WARD.

20 Subscribed in my presence and sworn to before me this 2nd day of November, A. D. 1895.

[SEAL.] JOHN E. THOMAS,
Notary Public.

"EXHIBIT A."

The State of Wyoming to the sheriff of Uinta county, Greeting:

Whereas Race Horse, an Indian not in the Indian country and a fugitive from justice, has been arrested on an information in writing, filed in the district court in and for the county of Uinta, in the State of Wyoming, signed and sworn to by John C. Hamm, county and prosecuting attorney in and for the county aforesaid, charging that the said Race Horse, on the first day of July, A. D. 1895, in the

county of Uinta, State of Wyoming, seven elk unlawfully, wantonly, and in excess of the number he could immediately use for food purposes did take, capture, kill, and destroy; and whereas, upon the filing of the information aforesaid, the said Race Horse was required by me to give bail in the sum of five hundred dollars for his appearance before the district court of said county on the first day of the next term thereof; and whereas he has failed to give such bail: Therefore, in the name of the State of Wyoming, you are commanded to receive the said Race Horse into your custody and him safely keep until discharged by due process of law.

Given under my hand and the seal of said court, at Evanston, Wyoming, on this 3rd day of October, A. D. 1895.

JOHN W. SAMMON,
Clerk Third District Court.

[SEAL.]

21 "EXHIBIT B."

Information.

THE STATE OF WYOMING, } ss:
County of Uinta, }

In the District Court in and for said County.

Comes now John C. Hamm, county and prosecuting attorney of the county of Uinta, in the State of Wyoming, and in the name and by the authority of the State of Wyoming informs the court and gives the court to understand that Race Horse, a fugitive from justice, an Indian not in the Indian country, late of the county aforesaid, on the first day of July, A. D. 1895, at the county of Uinta, in the State of Wyoming, seven elk unlawfully, wantonly, and in excess of the number he could immediately use for food purposes did take, capture, destroy, and kill, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Wyoming.

JOHN C. HAMM,
County and Prosecuting Attorney of the County of Uinta, in the State of Wyoming.

THE STATE OF WYOMING, } ss:
County of Uinta, }

I, John W. Sammon, clerk of the third judicial district court within and for said county and State aforesaid, do hereby certify the foregoing to be a full, true, and complete copy of the original now on file in said court.

In testimony whereof I have hereunto subscribed my hand and affixed the official seal of said court, at my office, in Evanston, Wyoming, this 5th day of October, A. D. 1895.

[SEAL.]

JOHN W. SAMMON,
Clerk Third District Court.

22 And be it further remembered that thereafter and on the said second day of November, A. D. 1895, there was filed in said cause in the office of the clerk of said court by the said petitioner, Race Horse, the following reply to the respondent's return, to wit:

In the Circuit Court of the United States within and for the District of Wyoming.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus*.

Reply to Respondent's Return.

To the honorable the circuit court of the United States for the district of Wyoming:

Comes now the said Race Horse and, replying to the return of John H. Ward, the respondent herein, denies—

That the public lands of the United States at the place where the killing of said elk mentioned in the petition herein occurred have been surveyed, subdivided, and platted by the United States or had been so surveyed, subdivided, and platted long before the time of the commission of the said offence, or that at the said time or for any period before said time said lands were open to entry and settlement under the land laws of the United States.

The petitioner admits that a small portion of the lands had been so as aforesaid surveyed and platted and opened for settlement under the land laws of the United States, but that the same were and constituted a very inconsiderable portion of the entire body of public lands in that vicinity.

He denies that in the near vicinity of the place of killing said elk there were any lands which had been settled upon and entered under the land laws of the United States prior to the com-

23 mission of said offence.

He denies that there were any ranches or settlements of any kind within five miles of said place; but, on the contrary, he alleges the fact to be that the said act of killing said elk was committed at a point much more than five miles distant from any ranch or settlement whatever.

RACE HORSE,
By GIBSON CLERK,
His Attorney.

THE UNITED STATES OF AMERICA, }
District of Wyoming, } *ss:*

Gibson Clark, being first duly sworn, on his oath says that he is the attorney for the said petitioner, Race Horse; that he makes this reply on behalf of the said petitioner; that he knows the contents thereof and he verily believes the statements therein made are true.

GIBSON CLARK.

Subscribed and sworn to before me this sixth day of November, A. D. 1895.

[SEAL.] JESS H. LOOMIS,
Notary Public.

And be it further remembered that thereafter and on the said second day of November, A. D. 1895, being one of the regular days of the May, 1895, term of said court, the following proceedings were had in said court in said cause and were duly entered of record therein, to wit:

24 In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Now, on this day, comes John H. Ward, sheriff of Uinta county, Wyoming, bringing with him the body of said Race Horse, as commanded by the writ of *habeas corpus*, and makes return to the said writ of *habeas corpus* as commanded therein, and the said John H. Ward being represented by Willis Van Devanter, Benjamin F. Fowler, and J. C. Hamm, his attorneys, and the petitioner, Race Horse, being represented by Gibson Clark, Esquire, his attorney; and thereupon the said petitioner stated the substance and character of his reply and was by the court, with the consent of the respondent, granted further time within which to prepare and file his reply to the respondent's return, such reply when filed to be filed as of November 2nd, 1895.

And the hearing in this case was proceeded with by the introduction of evidence, but not concluded.

And be it further remembered that thereafter and on the fourth day of November, A. D. 1895, being one of the regular days of the May, 1895, term of said court, the following proceedings were had in said court in said cause and were duly entered of record therein, to wit:

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Now, on this day, again come the parties hereto, John H. Ward, sheriff of Uinta county, Wyoming, being represented by Willis Van Devanter and Benjamin F. Fowler, and the petitioner, Race Horse, being represented by Gibson Clark, Esquire, his attorney.

25 After hearing the evidence and argument of counsel the matter was taken under advisement by the court.

And it is ordered by the court that the said Race Horse be admitted to bail, and that the bail be fixed at the sum of three hundred dollars, conditioned upon his appearance in this court on the twenty-third day of November, A. D. 1895, and to remain at and abide the further order of the court and not depart without leave thereof.

And be it further remembered that thereafter and on the said fourth day of November, A. D. 1895, there was filed in said cause, in the office of the clerk of said court, a recognizance by the said Race Horse, bearing the approval of the clerk of said court written thereon; which said recognizance, with the endorsement of approval thereon, is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
District of Wyoming, }

In the Circuit Court within and for the Eighth Judicial Circuit.

In Re RACE HORSE. Application for writ of *habeas corpus.*

Recognizance.

Whereas Race Horse, a Bannock Indian, was charged in the district court of the county of Uinta, in the State of Wyoming, with the offence of killing game in excess of the quantity he needed for immediate use and contrary to the statutes of the State of
26 Wyoming in that behalf;

And whereas such proceedings were had in said cause in said district court that the said Race Horse was committed to the custody of the sheriff of said Uinta county until he was discharged by due process of law;

And whereas on the 7th day of October, A. D. 1895, said Race Horse presented to this court an application for a writ of *habeas corpus*, alleging that his detention by the said sheriff was illegal;

And whereas this court did, on the said 7th day of October, A. D. 1895, issue a writ of *habeas corpus* directed to the said sheriff, requiring him to bring the body of the said Race Horse into this court in order that he might then and there do and receive what shall then and there be considered and determined concerning his said restraint;

And whereas, in obedience to said writ, the said sheriff did bring the body of the said Race Horse into this court;

And whereas the said circuit court did, on the 4th day of November, A. D. 1895, make an order that the said Race Horse should be admitted to bail in the sum of three hundred dollars ($300.00) until the incoming of court at ten o'clock a. m. on the 23rd day of November, A. D. 1895, and pending the consideration of his said application be discharged from custody:

Now, therefore, know all men by these presents that we, Race Horse, a Bannock Indian, and Ravenel Macbeth, do hereby acknowledge ourselves, jointly and severally, to owe and to be indebted to the United States of America in the sum of three hundred dollars ($300.00), the same to be levied of our and of each of our goods and chattels, lands and tenements.

In witness whereof we have hereunto set our hands and seals this 4th day of November, A. D. 1895.

27 The condition of the foregoing obligation is such that if the said Race Horse shall be and appear at the circuit court

of the United States of America within and for the district of Wyoming at a session to be held and commencing at the city of Cheyenne, in the State and district of Wyoming, at ten o'clock a. m. on the 23rd day of November, A. D. 1895, then and there to do and receive what shall be required of him by the said court, then this obligation to be null and void; otherwise to be and remain in full force and effect.

his
RACE x HORSE.
mark.
RAVENEL MACBETH.

Witness:
GIBSON CLARK.

UNITED STATES OF AMERICA, } ss:
District of Wyoming, }

I, Ravenel Macbeth, being first duly sworn, do say that I am the person who signed the foregoing recognizance as surety for the said Race Horse; that I am worth the sum of three hundred dollars ($500.00) over and above all my just debts and liabilities.

RAVENEL MACBETH.

Subscribed and sworn to before me this 4th day of November, A. D. 1895.

LOUIS KIRK,
Clerk U. S. Cir. Ct., Dist. of Wyo.

Above bond approved this 4th day of November, 1895.

LOUIS KIRK, *Clerk.*

28 And be it further remembered that thereafter and on the twenty-first day of November, A. D. 1895, being one of the regular days of the November, 1895, term of said court, the following proceedings were had in said court in said cause and were duly entered of record therein, to wit:

THE UNITED STATES OF AMERICA, } ss:
District of Wyoming, }

In the Circuit Court.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Order of Discharge.

The above-entitled matter coming on to be heard upon the petition of said petitioner, Race Horse, for a writ of *habeas corpus*, and upon the return of John H. Ward, the sheriff of Uinta county, Wyoming, the respondent herein, to which said return there is attached a copy of the complaint filed in and process issued from the district court of the county of Uinta, in the State of Wyoming, under which the said petitioner was restrained of his liberty by said respondent, and upon the reply of said petitioner to said return of

said respondent, and upon the evidence introduced on behalf of said petitioner and of said respondent upon the questions of fact put in issue by said pleadings, and the court, being now duly advised in the matter and having heard arguments of counsel for petitioner and respondent, doth find—

That the said petitioner is in custody for an act done in pursuance of a treaty concluded July 3rd, A. D. 1868, by and between the United States of America and the eastern band of Shoshones and the Bannock tribe of Indians, and is in custody in violation
29 of the Constitution and laws of the United States of America.

It is now ordered by the court that the said petitioner, Race Horse, be, and he is hereby, discharged from custody; to which finding, order, and judgment the respondent, John H. Ward, as such sheriff, now and here excepts.

Nov'r 21, 1895. JOHN A. RINER, *Judge.*

And be it further remembered that on the said twenty-first day of November, A. D. 1895, there was filed in said cause, in the office of the clerk of said court, a petition for an appeal to the Supreme Court of the United States, bearing an endorsement of allowance written thereon by the judge of said court; which petition for appeal, with the endorsement of allowance thereon, is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Wyoming.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Petition for Allowance of Appeal.

To the Supreme Court of the United States:

30 John H. Ward, sheriff of the county of Uinta, in the State of Wyoming, feeling himself aggrieved by the order and judgment made and entered on the twenty-first day of November, A. D. 1895, in the above-entitled proceeding in the above-named circuit court, and believing that there is manifest error in the said order and judgment rendered against him therein, does hereby appeal from the said order and judgment to the Supreme Court of the United States and prays that his appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order is made, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN H. WARD,
Sheriff of Uinta County, Wyoming,
By BENJ. F. FOWLER,
JOHN W. LACEY AND
WILLIS VAN DEVANTER,
His Attorneys.

Appeal allowed as prayed.

JOHN A. RINER, *Judge.*

And be it further remembered that at the time of filing the said petition for appeal and with the said petition for appeal there was filed in said cause, in the office of the clerk of said court, the following assignment of errors on appeal, to wit:

31 In the Circuit Court of the United States for the District of Wyoming.

In the Matter of the Application of RACE HORSE for a writ of *Habeas Corpus*.

Assignment of Errors on Appeal to the Supreme Court of the United States.

Comes now John H. Ward, the sheriff of the county of Uinta, in the State of Wyoming, and shows that there is manifest error prejudicial to him in the order, judgment, record, and proceedings in the above-entitled proceeding in the circuit court aforesaid, in this, to wit:

1. The court erred in discharging the said petitioner, Race Horse, when the writ of *habeas corpus* should have been discharged and the petitioner remanded to the custody of the said Ward as such sheriff.

2. The court erred in holding that the right to hunt granted to the petitioner, Race Horse, and other Bannock and Shoshone Indians under article IV of the treaty mentioned in the petition and the return herein was not subject to regulation under the police power of the State of Wyoming.

3. The court erred in holding that the place of the commission of the offense with which the said Race Horse was charged and held in custody under the laws of the State of Wyoming was "unoccupied lands of the United States," within the meaning of article IV of the treaty aforesaid.

32 4. The court erred in construing article IV of the treaty aforesaid in holding that the right to hunt granted therein was absolute and not subject to regulation under the police power of the State of Wyoming.

5. The court erred in construing article IV of the treaty aforesaid in holding that the place of the commission of the offense with which the said Race Horse was charged and held in custody under the laws of the State of Wyoming was "unoccupied lands of the United States" within the meaning of article IV of the treaty aforesaid.

6. The court erred in holding that the provision relating to the right of the Indians to hunt contained in article IV of the treaty aforesaid gave to and preserved in the petitioner, Race Horse, and other Bannock and Shoshone Indians, the right to hunt and kill game at the place in question and within the State of Wyoming, notwithstanding the act of admission of the State of Wyoming passed by the Congress of the United States.

7. The court erred in holding that the provision relating to the

right of the Indians to hunt contained in article IV of the treaty aforesaid was not repealed, abrogated, or modified by the act of Congress admitting the State of Wyoming into the Union.

8. The court erred in holding that the statute of the State of Wyoming regulating the killing and taking of game was in violation of article IV of the treaty aforesaid, and therefore void and of no effect as against the Bannock and Shoshone Indians named in such treaty.

Wherefore the said John H. Ward, as such sheriff, prays that the order and judgment of the above-named circuit court in the above-entitled proceeding be reversed by the Supreme Court of the United States, and that the circuit court of the United States for the
33 district of Wyoming be ordered to enter an order directing the discharge of the said writ of *habeas corpus* and remanding the said Race Horse to the custody of the said Ward as such sheriff.

JOHN H. WARD,
Sheriff of Uinta County, Wyoming,
By BENJ. F. FOWLER,
JOHN W. LACEY AND
WILLIS VAN DEVANTER,
His Attorneys.

And be it further remembered that on the said twenty-first day of November, A. D. 1895, there was filed in said cause, in the office of said clerk, a bond on appeal, with an endorsement of approval written thereon by the judge of said court; which said bond and endorsement of approval are in words and figures following, to wit:

In the Circuit Court of the United States for the District of Wyoming.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Bond on Appeal.

Know all men by these presents—

34 That we, William A. Richards and William A. Robins, are held and firmly bound unto the above-named petitioner, Race Horse, in the full and just sum of five hundred dollars ($500.00), to be paid to the said Race Horse, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-first day of November, A. D. 1895.

Whereas lately, in the circuit court of the United States for the district of Wyoming, in a proceeding depending in said court wherein the said Race Horse as petitioner sought to be discharged from the custody of John H. Ward, as sheriff of the county of Uinta,

in the State of Wyoming, an order and judgment was rendered against the said John H. Ward, as such sheriff, and the said Ward, as such sheriff, having in open court obtained an appeal from the said circuit court to the Supreme Court of the United States to reverse the order and judgment in the aforesaid proceeding:

Now, the condition of the above obligation is such that if the said Ward as such sheriff shall prosecute said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM A. RICHARDS. [SEAL.]
WILLIAM A. ROBINS. [SEAL.]

Sealed and delivered in the presence of—
SAMUEL CORSON.

Approved:
JOHN A. RINER, *Judge.*

35 And be it further remembered that on the said twenty-first day of November, A. D. 1895, being one of the regular days of the November, 1895, term of said court as aforesaid, the following proceedings were had in said court in said cause and were duly entered of record therein, to wit:

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Comes now the said petitioner, Race Horse, in his own proper person and accompanied by Gibson Clark, attorney for the United States and attorney for said petitioner.

And comes also John H. Ward, as sheriff of Uinta county, Wyoming, the respondent herein, by his counsel.

And the said respondent, John H. Ward, as such sheriff, now presents unto the court his petition and prayer for an appeal to the Supreme Court of the United States from the order and judgment herein, and also presents with such petition an assignment of errors.

And it is now ordered by the court that such appeal be, and the same is hereby, allowed as prayed for.

And it is further ordered by the court that the said John H. Ward, as such sheriff, give good and sufficient security in the sum of five hundred dollars ($500.00) that he will prosecute his said appeal to effect, and if he fail to make his plea good shall answer all costs.

And the said John H. Ward, as such sheriff, now presents unto the court a bond on appeal, with good and sufficient security as required by this order, and such bond is now approved by the court.

And it is further ordered by the court that pending such
36 appeal the said petitioner, Race Horse, be enlarged upon recognizance in the sum of three hundred dollars ($300.00) to answer the judgment of the Supreme Court of the United States upon such appeal, and for good and sufficient reasons it is ordered by the court that sureties upon such recognizance be not required,

and that the personal recognizance of the said Race Horse be accepted; which recognizance the said Race Horse now presents unto the court in due form, and the same is now approved.

And it is further ordered by the court that for the purpose of preserving and transmitting the entire proceedings in this court in this cause to the Supreme Court of the United States upon such appeal, the said respondent, John H. Ward, as such sheriff, is now granted until and including the sixteenth day of December, 1895, within which to reduce to writing and present to this court or the judge thereof for allowance and certification a bill of exceptions containing the evidence produced upon hearing of this cause.

And it is further ordered that when the said bill of exceptions containing such evidence is allowed and certified by this court or the judge thereof the same shall be and become a part of the record and proceedings in this cause, and shall be transmitted on such appeal to the Supreme Court of the United States as a part of such record and proceedings.

JOHN A. RINER, *Judge.*

And be it further remembered that on the twenty-second day of November, A. D. 1895, there was filed in said cause, in the
37 office of the clerk of said court, a recognizance by the said Race Horse, bearing the approval of the judge of said court written thereon; which said recognizance, with the approval thereon, is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
District of Wyoming, }

In the Circuit Court.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Recognizance.

Know all men by these presents that I, Race Horse, the petitioner in the above-entitled cause, do hereby acknowledge myself to be indebted unto the United States of America in the sum of three hundred dollars, the same to be levied of my lands, tenements, goods, and chattels; for the payment of the same, well and truly to be made, I do hereby bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated this 22nd day of November, A. D. 1895.

The condition of the foregoing obligation is such that—

Whereas in the above-entitled cause an order was made on the 21st day of November, A. D. 1895, discharging said defendant from further custody;

And whereas John H. Ward, the respondent in said entitled cause, hath appealed from said order and judgment to the Supreme Court of the United States of America:

Now, therefore, the condition of this obligation is such
38 that if the said order and judgment of the said circuit court should be reversed by the Supreme Court of the United States, that then and in that case the said Race Horse will at once deliver himself up to the said circuit court to answer the judgment of said Supreme Court of the United States and to do and receive what may be by said court required of him.

his
JOHN x RACEHORSE.
mark.

Witness:
RAVENEL MACBETH.
GIBSON CLARK.

Approved:
JOHN A. RINER, *Judge.*

And be it further remembered that thereafter and on the sixteenth day of December, A. D. 1895, there was filed in said cause, in the office of the clerk of said court, the following bill of exceptions, to wit:

In the Circuit Court of the United States for the District of Wyoming.

In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Bill of Exceptions.

Be it remembered that on the 2nd day of November, A. D.
39 1895, being one of the regular days of the May, 1895, term of said court, this cause came on for hearing and trial before said court, Honorable John A. Riner, judge presiding, and the said Race Horse, to maintain the issues upon his part, produced the following evidence, to wit:

It is now admitted by the petitioner that the offense with which he, the said Race Horse, stands charged under the laws of Wyoming, as stated in the pleadings in this cause, was committed, if at all, at a point in the mountains lying between Mount Hoback and Horse creek, a tributary of Green river, and in the direction of Horse creek from said Mount Hoback, but not near any ranch-house or place where white people were living.

CHARLES BELLAMY, being first duly sworn, testified that he was, at the time he testified in this case, the chief clerk in the office of the surveyor general of the United States for Wyoming, and was familiar with and had the custody of the records, plats, and files of that office; that Horse creek, a tributary of Green river, is located in township thirty-three (33) north, of range one hundred and eleven (111) west, and in township thirty-four (34) north, of ranges one hundred and twelve (112) west and one hundred and thirteen (113) west, as

shown upon the official plats; that the exterior boundaries of township thirty-eight (38) north, of range one hundred and fourteen (114) west, township thirty-seven (37) north, of range one hundred and fourteen (114) west, and township thirty-five (35) north, of range one hundred and thirteen (113) west, were surveyed in 1893, but these townships have not been subdivided or platted; that township thirty-eight (38) north, of ranges one hundred and ten (110), one hundred and eleven (111), one hundred and twelve (112), and one hundred and thirteen (113) west were surveyed, subdivided, and platted in 1893, but the surveys have not been paid
40 for and the plats have not been filed in the local land office; that township thirty-seven (37) north, of ranges one hundred and ten (110), one hundred and eleven (111), one hundred and twelve (112), and one hundred and thirteen (113) west, were surveyed, subdivided, and platted in 1893, but the survey has not been paid for and the plats have not been filed in the local land office; that township thirty-six (36) north, of ranges one hundred and eleven, one hundred and twelve (112), one hundred and thirteen (113), and one hundred and fourteen (114) west, were surveyed, subdivided, and platted and the surveys paid for in 1892 and 1893, but the plats have not been filed in the local land office; that township thirty-five (35) north, of ranges one hundred and eleven (111) and one hundred and twelve (112) west, were surveyed, subdivided, and platted and the surveys paid for in 1892, but the plats have not been filed in the local land office; that township thirty-four (34) north, of ranges one hundred and eleven (111), one hundred and twelve (112), and one hundred and thirteen (113) west, were surveyed, subdivided, and platted and the survey paid for in 1892, but the plats have not been filed in the local land office.

P. H. RAY, being first duly sworn, testified that he had been for several years a captain in the 8th infantry of the U. S. Army; that in 1891 he was engaged for a considerable time in scouting in the vicinity of Hoback mountain; that it is a large, rough mountain, covering a large scope of country; that the country about there is mountainous, with timber on the sides of the mountains, and sloping or level land near the streams; that there was an abundance of game in that country when he was there, and there were no settlers or white people living anywhere in that vicinity; that he had not been there since and did not know what, if any, changes in the conditions had occurred since 1891.

41 RACE HORSE, the petitioner, being duly sworn, testified that he was the petitioner and a Bannock Indian; that there were no ranches, houses, or white people living near the place where he killed the elk; that while he was camped where he killed the elk he rode to the store where they had a cinnamon bear chained up and back to camp the same day; that it was a day's trip; that the only white people he saw while in that vicinity were at this store, and it is the only white man's house he knew of in that vicinity; that he kept in the timber and up in the hills all the time

he was in that country, and did not at any time go out into the open country; that he had been there several times before; that he killed the elk up in the timber in the mountains; that they do not go into the open country.

The above and foregoing is in substance all of the evidence produced by the said petitioner.

And the respondent, John H. Ward, as sheriff, to maintain the issues upon his part, produced the following evidence, to wit:

J. FRANK WARNER, being first duly sworn, testified that he was a civil engineer and surveyor and had done considerable surveying for the United States in the northern part of Uinta county, Wyoming, during the last four or five years; that he was familiar with Hoback mountain and the country adjacent thereto; that he surveyed the exterior boundaries of township thirty-seven (37) north, of range one hundred and fourteen (114) west, in the southwest portion of which the top of Hoback mountain is located; that he also surveyed much of the surveyed land lying east and southeast of Hoback mountain; that he was in that country for several months in 1892 and for several months in 1893 and for about a month preceding July 1st, 1895; that in June, 1895, he surveyed an irrigating ditch for Faylor's ranch, the ranch-house being
42 located in section thirteen (13) of township thirty-seven (37) north of range one hundred and thirteen (113) west; that they have a store at that ranch, and they also had a cinnamon bear chained up at this store. He then produced a map showing the location of Hoback mountain and also covering the country lying east and southeast thereof, and testified that this map was made by him from the plats, records, and field-notes in the office of the surveyor general of the United States for Wyoming. He further testified that there are white people living at the ranches, store, sawmill, and blacksmith's shop noted on this map; that in addition to the store at Faylor's ranch there is also a store on North Beaver creek; that these people were, most of them, living there in 1893, and all of them before July, 1895; that a point twenty miles due southeast of the top of Hoback mountain would be in the valley of Horse creek and within two miles of Hartley's ranch; that a part of the country covered by this map is mountainous and quite rough; that there is timber on the hills and sides of the mountains; that near the streams there are valleys and some of the land away from the streams is rolling and covered with sage brush. He further testified on cross-examination that the entire country shown on the map produced by him, the same being a region of country 30 by 36 miles in extent, was what would be known as a mountainous country, and that within this region of country there were only seven ranches in 1895.

The map produced by this witness was then offered and admitted in evidence and is hereto attached, marked "Exhibit A."

(Here follows map marked Exhibit A.)

JOHN H. WARD being first duly sworn, testified that he was the sheriff of Uinta county, Wyoming, and had been such sheriff for ten years; that he had for several years been familiar with the country about Horse creek and Hoback basin and in that vicinity,
43 and knew the people living at Hartley's ranch and at the other places designated upon the map produced in evidence, and knew that they reside at the places designated; that in the fall of 1894 he gathered a herd of cattle on Horse creek, and while there was at Hartley's ranch, Apperson's ranch, and Toad's blacksmith shop; that the people living in Hoback basin and on Horse creek and in that vicinity voted at Big Piney in 1894; that there is a settlement of about three hundred people in the vicinity of Big Piney, which is about thirty miles south of Horse creek, and there is also a large settlement in the vicinity of Marysvale, which is northwest of Hoback mountain, but he did not know the distance; he had been at both places, but had never traveled from one to the other.

WILLIAM A. RICHARDS, being first duly sworn, testified that he was a surveyor by profession; that he had for several years been acquainted with the country in northern Uinta county, in the vicinity of Hoback mountain; that he was United States surveyor general for Wyoming in 1893, and in that year personally inspected the surveys which had recently been made in that vicinity; that he had stopped over at Hartley's ranch and knew that settlers live at the points designated on the map introduced in evidence; that the country in that vicinity is mountainous and quite rough. There is timber on the hills and on the sides of the mountains. There are valleys along the streams. The land between the valleys and the mountains is rolling and is too high for agriculture; that at the time he visited the region of country shown on said map he saw native cattle and also wild game in very considerable numbers within said region of country.

The above and foregoing is in substance all of the evidence produced upon such hearing by the respondent.

The above and foregoing statement of the facts testified to
44 by the several witnesses, both for the petitioner and respondent, at the hearing, contains all of the facts material to the issues in this case which the testimony of said witnesses tended to prove.

45 And be it further remembered that after hearing the said evidence and the arguments of counsel the court reserved its decision until the twenty-first day of November, A. D. 1895, that being one of the regular days of the November, 1895, term of said court, at which time the court found for the said Race Horse and ordered him discharged; to which finding and order of the court the respondent at the time excepted and thereafter and on the 16th day of December, 1895, prayed the court to sign and allow this his bill of exceptions in that behalf, which is now (within the

time allowed by the court to the respondent to reduce his exceptions to writing and during the term at which said cause was tried) done accordingly, and the same is ordered to be filed and made a part of the record in this cause this 16th day of December, A. D. 1895.

JOHN A. RINER, *Judge.*

And be it further remembered that on the said sixteenth day of December, A. D. 1895, being one of the regular days of the November, 1895, term of said court, the following proceedings were had in said court in said cause and were duly entered of record therein, to wit:

46 In the Matter of the Application of RACE HORSE for a Writ of *Habeas Corpus.*

Now, on this day, comes the respondent, John H. Ward, being represented by his attorneys, Benjamin F. Fowler and Lacey & Van Devanter, and Race Horse, being represented by Gibson Clark, Esquire, United States district attorney, and presents to the court his bill of exceptions herein, and the same, after being corrected, is signed, allowed, and by the court ordered filed and made a part of the record in this case pursuant to the order of the court heretofore made herein.

And be it further remembered that at the time of making the order and rendering the judgment discharging the said petitioner, Race Horse, the said court, through its presiding judge, Honorable John A. Riner, delivered a written opinion, which was filed in said cause in the office of the clerk of said court on the said twenty-first day of November, A. D. 1895; which said opinion is in words and figures following, to wit:

47 *In Re* RACE HORSE.

(Circuit Court, D. Wyoming.)

Habeas Corpus.

Gibson Clark, United States attorney, for petitioner.

Benjamin F. Fowler, attorney general, Willis Van Devanter, and John C. Hamm for respondent.

RINER, *J.:*

On the seventh day of October, 1895, the petitioner, Race Horse, filed in this court his petition and application for a writ of *habeas corpus.*

He sets forth in his petition that he is a Bannack Indian and a member of that certain tribe of Bannack Indians which entered into and concluded a treaty with the United States of America at Fort Bridger, in the Territory of Utah, on the third day of July, A. D. 1868, and that he resides upon what is known as the Fort Hall Indian reservation, situate in the eastern part of the State of Idaho.

He further represents in his petition that he was born a member of said tribe of Indians; that he was a member thereof at the time of the making of said treaty, and has at all times and still does maintain tribal relations with said tribe of Bannack Indians.

He further sets forth in his petition that he is unjustly and unlawfully and in violation of the Constitution of the United States and in violation of article IV of the treaty entered into between the Bannack Indians and the United States restrained of his liberty and held in custody by one John H. Ward, the sheriff of Uinta county, in the State of Wyoming, at the town of Evanston, in said county, by virtue of a warrant of commitment issued out of and under the seal of the district court of the third judicial district of the State of Wyoming within and for the county of Uinta, in said State.

48 He further alleges and sets forth in his petition that Mr. John C. Hamm, county and prosecuting attorney of Uinta county, on the third day of October, 1895, filed in said court an information charging that the petitioner did, on the first day of July, 1895, at the county of Uinta, in the State of Wyoming, seven elk unlawfully, wantonly, and in excess of the number he could immediately use for food purposes take, capture, destroy, and kill, contrary to the form of the statute of the State of Wyoming, and that thereafter a warrant was duly issued out of the clerk's office of the said district court and under the seal thereof for his arrest; that he was thereupon arrested and brought before the clerk of the district court and was held to bail in the sum of five hundred dollars for his appearance before the said district court on the first day of the next term thereof; that he failed to give the bond required and was in default thereof committed to the custody of the sheriff of Uinta county, to be by him safely kept until discharged by due process of law.

Copies of the information and warrant are attached to the petition.

The petitioner admits that he did pursue, hunt, and kill the seven elk mentioned in the information, and alleges that he killed the said seven elk at a point about twenty miles southeast of Mt. Hoback, in the county of Uinta and State of Wyoming, on or about the first day of July, 1895.

He then alleges that the place where he killed the elk was about sixty miles distant from any ranch or settlement of any kind whatever, and was upon unoccupied lands of the United States; that there were no occupied or settled lands nearer than sixty miles to the point where said act of killing was done; that at the time said elk were killed by him there was wild game in abundance upon the lands just mentioned and in the immediate vicinity of the

49 point at which he killed the elk in question; that the lands over which he was at that time hunting constituted and were lands which the said tribe of Indians had for a great many years last past been in the habit of hunting over and upon; that along and upon the borders of said hunting districts and of said lands over which the said Indians had been in the habit of hunting peace

between the whites and Indians had for many years subsisted, and was subsisting and did subsist at the time the petitioner was hunting thereon and at the time he killed the seven elk mentioned in the information or complaint.

He admits that the seven elk were in excess of the number he could immediately use for food purposes, but he alleges that he killed these elk solely for the purpose of furnishing means of subsistence for himself and family and for other members of the Bannack tribe of Indians, saving, curing, and preserving the meat of the animals so killed so that it might be and constitute a food supply for the use of himself, his family, and others of said Bannack tribe of Indians during the following winter.

He then sets out in his petition article IV of the treaty between the United States and the Bannack Indians, which is in the following words:

"Art. IV. The Indians herein named agree, when the agency-house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

He then alleges that the complaint and information to answer which he is unlawfully and wrongfully held in custody is based upon an act of the legislature of the State of Wyoming approved February 20th, 1895, entitled "An act for the preservation of game and fish," being chapter 98 of the Session Laws of Wyoming of 1895.

50 He then alleges that his detention, restraint, and imprisonment are illegal for the reason that under and by virtue of the treaty provision above quoted he had the right under the Constitution and laws of the United States to hunt and kill said seven elk upon the unoccupied lands of the United States, and that this right was a right guarantied to him by the laws and Constitution of the United States; that the act of the legislature of the State of Wyoming, in so far as it in any manner whatsoever related to him, was and is wholly and absolutely void, being in derogation of and contrary to the provisions of the treaty, and especially to article IV above quoted. He further asks that a writ of *habeas corpus* may issue out of this court, directed to the sheriff of Uinta county, Wyoming, to the end that he may forthwith be brought before the court to so submit to and receive what the law may direct.

Upon the filing of this petition the writ was duly issued out of this court, directed to the sheriff of Uinta county, Wyoming, directing him to have the body of the petitioner before the court at Cheyenne, Wyoming, on the twenty-sixth day of October, 1895, at ten o'clock in the forenoon of that day. Upon application duly made and at the request of both counsel for the petitioner and the sheriff the hearing was, on the twenty-sixth day of October, continued until the second day of November, 1895, and the sheriff was given until that day to make his return to the writ. Upon the last-named

day Mr. Ward, the sheriff, produced the body of the petitioner, as directed by the writ, and made return thereto that he held the petitioner in custody under and by virtue of a warrant of commitment under the hand and seal of the clerk of the district court of the county of Uinta, in the State of Wyoming; that the said warrant of commitment was duly and regularly issued upon a criminal information theretofore duly and regularly made, presented,
51 and filed in the said district court of the county of Uinta, in the State of Wyoming, by the county and prosecuting attorney of said county, and that he did prior to and at the time of the service of the writ of *habeas corpus* hold and detain and that he still holds and detains the said petitioner, Race Horse, in his custody under and in pursuance of the command of the said warrant of commitment and not otherwise.

He then alleges that the accusation and charge against the petitioner is still depending and not disposed of by the district court of that county, and that the cause of the detention of petitioner by him as sheriff of Uinta county is that he may have petitioner before the said district court at the next term thereof, on the first Monday in April, A. D. 1896, then and there to answer the charge and accusation made in the said criminal information filed by the county and prosecuting attorney.

He then admits that the petitioner is a Bannack Indian and a member of the Bannack tribe which concluded a treaty with the United States at Fort Bridger on the third day of July, 1868, and that the petitioner resides at Fort Hall Indian reservation; that the petitioner was born a member of that tribe; that he was a member thereof at the time of making the said treaty, and that at all times mentioned in the petition or application the petitioner maintained tribal relations with said tribe of Bannack Indians.

He further admits that the elk were killed by the petitioner at the place mentioned in the petition, and that they were killed on public lands of the United States which had not been entered under the land laws of the United States and which had not been settled upon.

He then alleges in substance that the public lands of the United States at the place and in the vicinity where the elk were
52 killed had been surveyed, subdivided, and platted by the United States and had been so subdivided and platted long before the time of the commission of the alleged offense by petitioner, and long before then and ever since had been opened to entry and settlement under the land laws of the United States.

He further alleges that a considerable portion of the public lands in and near the vicinity of the place where the elk were killed had been before the time of the commission of the offense settled upon and duly entered under the land laws of the United States and were occupied and used by the persons making such entry as homes.

He then alleges that the place where the alleged offense was committed and the country adjacent thereto, at the time of the commission of the offense, constituted a part of the State of Wyoming and a part of the county of Uinta and was included in and constituted

a part of the school districts and election districts in which said country had been theretofore and was then duly and regularly subdivided pursuant to the laws of the State of Wyoming.

He further alleges that the land at the place where the alleged offense was committed and in the country adjacent thereto, which were not then enclosed and fenced by settlers and entrymen thereon, were, at the time of the commission of the offense, used as an open and common grazing ground for the grazing of live stock by the citizens of the State of Wyoming and citizens of other States who had and owned live stock in large numbers at that time, grazing, running, and ranging thereon; that the country adjacent thereto was, in the year 1895 and other years previous thereto, divided into round-up districts pursuant to the laws of the State of Wyoming, and that the cattle ranging thereon were, in the year 1895 and in other years previous thereto, rounded-up, gathered, and
53 handled according to the long-established custom prevailing upon such round-ups and pursuant to the laws of said State.

He then admits that at the time of the commission of the alleged offence by petitioner peace between the white persons residing in the vicinity of the place of the commission of said offense and the said Bannack Indians and all other Indians had for many years subsisted and was then subsisting.

He then denies (by reason of the matters and things set out in his return) that the said petitioner, Race Horse, is or has been wrongfully and unlawfully held in custody, and concludes his return in the following words: "Nevertheless the body of the said Race Horse I have now here before this honorable court, as in said writ of *habeas corpus* commanded, to be dealt with according to law, and herewith I return the said writ of *habeas corpus*, with this my return thereon."

To this return the district attorney, who appeared for the petitioner, filed the following reply:

"Comes now the said Race Horse, and, replying to the return of John H. Ward, the respondent herein, denies—

That the public lands of the United States at the place where the killing of said elk mentioned in the petition herein occurred have been surveyed, subdivided, and platted by the United States or had been so surveyed, subdivided, and platted long before the time of the commission of the said offence, or that at the said time or for any period before said time said lands were open for entry and settlement under the land laws of the United States.

The petitioner admits that a small portion of the lands had been so as aforesaid surveyed and platted and opened for settlement under the land laws of the United States, but that the same were and constituted a very inconsiderable portion of the entire body of public lands in that vicinity.

54 He denies that in the near vicinity of the place of killing said elk there were any lands which had been settled upon and entered under the land laws of the United States prior to the commission of said offence.

He denies that there were any ranches or settlements of any kind within five miles of said place, but, on the contrary, he alleges the fact to be that the said act of killing said elk was committed at a point much more than five miles distant from any ranch or settlement whatever."

The sections of the statute which it is alleged the petitioner violated are as follows:

"SEC. 6. The wanton destruction or the wasting of the game and fish of this State during any period of time when the taking or capture of such game or fish is permitted is hereby prohibited and declared a misdemeanor; and any person who shall at any time take, capture, or destroy any game or fish in excess of the number or quantity thereof which he can immediately use for food purposes shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten, nor more than fifty dollars and costs of prosecution for each and every animal, bird or fish, which he or she may take or destroy, contrary to the provisions of this section."

"SEC. 14. It shall be unlawful to pursue, hunt or kill any deer, elk, moose, mountain sheep, mountain goat or antelope at any time except during the months of September, October and November in each year, during which months the males only of such animals may be killed or hunted under the conditions and restrictions imposed by this section. It shall be unlawful at any time whatever to kill or capture any of the above-named animals mentioned in this section, by means of any pit, pitfall or trap. Any person may during the period permitted and prescribed by this section, pursue, hunt and kill any of the males of the animals mentioned in this section for the purpose only of supplying himself with food, but not for speculative purpose or wantonly. In order to prevent more effectively the hunting and slaughter of the animals mentioned in this section for speculative purposes, it is hereby declared to be unlawful for any non-resident of this State to hunt, kill or pursue any of the male animals permitted by this section to be hunted, killed or pursued herein, without having first procured a license therefor, so to do from a justice of the peace of the county wherein said animals are to — hunted. The justices of the peace of this State are hereby authorized and directed to issue such licenses upon the payment of twenty dollars for each license, which shall be good in their county. Such license shall permit such non-resident to pursue, hunt or kill, any of the males of the animals mentioned in this section during the months of September, October and November of the current year for the purpose of supplying himself or his family with food during such period."

The petition, return, and reply in this case draw in question, upon the one hand, the validity of a treaty made by the United States with the Bannack and Shoshone Indians, or at least a construction of that treaty and of the rights and privileges claimed under it, and they also draw in question, upon the other hand, the validity of a statute of the State of Wyoming on the ground of its

being repugnant to the Constitution, laws, and treaties of the United States.

The task for the court, therefore, as can be readily seen, is a delicate one and only to be entered upon with reluctance and hesitation. It must be evident to any one that the power to declare either a treaty made by the General Government or a legislative en-
56 actment void is one which the court will shrink from exercising in any case where it can, with due regard to duty and official oath, decline the responsibility; but the duty to do this in a proper case the courts cannot decline. They have no discretion in selecting the subjects to be brought before them, and the duty, however unpleasant, cannot be avoided.

No question has been raised as to the jurisdiction of the court in this case, but the courts of the United States are courts of limited jurisdiction and in ordinary cases can have no control of the courts or judicial officers of the States while engaged in enforcing their criminal laws. It may be well, therefore, to consider briefly the statute under which this proceeding was brought. Section 753 of the Revised Statutes of the United States provides that a writ of *habeas corpus* may issue from the circuit court of the United States in all cases where the petitioner is in custody for an act done or committed in pursuance of a law of the United States or is in custody in violation of the Constitution of the United States or of a law or treaty of the United States. The Constitution of the United States declares: "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Under this provision of the Constitution and the section of the Revised Statutes above referred to, I think it is perfectly clear that this court has jurisdiction, and that it was not only its right, but its duty to issue the writ in a case such as is presented by the petitioner here and to proceed to determine whether or not he was restrained of his liberty in violation of the laws or of a treaty of the
57 United States. *In re* Bresnahan, 18 Fed. Rep., 62; *In re* Perret, 1 Fed. Rep., 481.

At the hearing some testimony was taken upon the question as to whether or not the public lands at or near the place where this alleged offense against the State law was committed were occupied by actual settlers or otherwise. I think the evidence shows that in a region of country thirty miles wide by thirty-six miles long, which includes the place at which this Indian killed the elk mentioned in the information referred to by the sheriff in his return, a very few settlers, not to exceed seven in number, have established ranches at different places on the different streams flowing through this region, and that cattle owned by residents of this State and other States range in the valleys and along the streams, and also that game animals are found there in large numbers; that this entire scope of country is what would be known and understood as a mountainous country,

with occasional valleys, and that on the mountains and in the timber elk, deer, and other game animals in very considerable numbers are found; that a portion of the lands within the territory above described have been surveyed, subdivided, and platted by the United States, and were open to entry and settlement under the land laws of the United States; that other portions of it remain unsurveyed; that this Indian killed the seven elk mentioned in the information in the mountains at some point within the territory above described. Upon this point the plat exhibited by the sheriff at the hearing does not tend to throw much light. The only direct evidence is that of the Indian, who testified that he killed the elk in the mountains at a point several miles distant from any ranch or human habitation, while the line indicated upon the plat, which is imaginary, and taken, I presume, from a general allegation in the petition that the point at which the elk was killed was
58 in a general southeasterly direction from Hoback peak or Hoback mountain, would locate the place at which the elk were killed in the valley of Horse creek, at a point under G. W. Hartley's ditch in section 14 and near the Hartley ranch. That this could not be the place is, I think, clearly established by the evidence. Not only have we the Indian's testimony that he killed these elk in the timber on the mountain, but it is clearly shown by the testimony of other witnesses who testified for the sheriff that elk are not usually found in the valleys or open country. Their habits in this respect are so well known that when the district attorney asked this Indian, while upon the witness stand, whether he killed these elk in the open country or in the timber on the mountain it not only caused the Indian to smile, but also almost every other person seated in the court-room, and the witness very promptly answered in the timber on the mountain.

Article IV of the treaty guarantees to these Indians that they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts. It is contended that there is no such country within the State of Wyoming and that the unoccupied lands of the United States mentioned in the treaty were of that character of unoccupied lands of the United States which constitute hunting districts beyond the borders of white settlement. Such is not the language of the treaty provision. By the treaty they are to have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts. To say that these hunting districts must be beyond the borders of white settlement would be adding to the treaty words which are not there and giving to it a construction which,
59 as it seems to the court, would not be warranted by its terms and provisions. In construing the treaty we must give to the words used their ordinary and accepted meaning. In the case of Worcester *vs.* Georgia, 6 Peters, 515, the Supreme Court an-

nounced even a broader rule, when applied to Indian treaties, in the following language:

"The language used in treaties with the Indians should never be construed to their prejudice. How the words of the treaty were understood by these unlettered people, rather than their critical meaning, should form the rule of construction."

Again, in the case of Hauenstein *vs.* Lynham, 100 U. S., 483, the court said: "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. Such is the settled rule of this court."

The treaty authorized these Indians to hunt (1) upon the unoccupied lands of the United States (2) so long as game may be found thereon (3) and so long as peace subsists among the whites and Indians on the borders of the hunting districts. The words "hunting districts" must, I think, be construed to mean districts of country upon which wild game exists and roams notwithstanding the fact that there may be white settlers here and there within such districts. Any other construction would, it seems to me, be equivalent to saying that the words at the time they were inserted in the treaty by the parties making it had no meaning whatever. For several years prior to that time, and certainly at the date of the treaty, there were occasional white settlers located at different points within the territory which now comprises the State of Wyoming. It seems to me equally clear that it would be an unwarranted construction to say that because this region of country, thirty
60 by thirty-six miles, contains a few white settlers and because cattle owned by citizens of this and other States range in the valleys and along the streams within this region, that it is therefore not unoccupied lands of the United States within the meaning of the terms and provisions of the treaty, especially when the testimony, as it does in this case, further shows beyond all question that game animals are also found there in very considerable numbers, especially in the timber on the mountains.

By the Constitution the power to make treaties is expressly delegated to the United States and prohibited to the States, hence the power to enter into treaty relations rests exclusively with the General Government, and by the express terms of the Constitution every treaty made under the authority of the United States is made the supreme law of the land, and therefore so long as the provisions of a treaty are in force, if they are in conflict with a law of any State, the State law must give way to its superior authority. This rule is essential to the existence of the Federal Government. Without it the Constitution, laws, and treaties of the United States would be subject to overthrow at any time at the will of a State. The Supreme Court of the United States, in the case of Ware *vs.* Hyalton, 3 Dallas, 199, says: "Here is a treaty, the supreme law, which overrules all State laws upon the subject to all intents and purposes. To effect the object intended there is no want of proper and strong language, there is no want of power, the treaty being sanctioned as the supreme law by the Constitution of the United States, which

nobody pretends to deny to be paramount and controlling to all State laws, and even to State constitutions, wheresoever they interfere or disagree." In the case just referred to the Commonwealth of Virginia, in 1777, then being at war with Great Britain, passed an act sequestering British property within her limits and providing, among other things, that debts due from citizens of Virginia
61 to British subjects should be paid into the treasury of the Commonwealth, and that such payment should operate as an extinguishment of the debt. In 1780 a citizen of Virginia paid into the treasury of the State a debt due from him to a British subject pursuant to the provisions of the State law. In 1783 a treaty of peace was concluded between the United States and Great Britain, which contained the following provision: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." After the adoption of the Constitution in 1789 suit was brought by a British subject in the circuit court for the district of Virginia against this citizen of Virginia to recover upon the debt contracted in 1774. The defendant pleaded payment into the treasury of the State in 1780, and the Supreme Court in that case held (1) that the State of Virginia had the right to enact the sequestration act of 1777; (2) that payment into the State treasury would be a bar to subsequent actions upon the debt unless the creditor's right was revived by the treaty; (3) that the treaty became the supreme law of the land, the constitutional provisions applying alike to treaties made and to be made; (4) that the provision of the treaty of peace with Great Britain above quoted nullified the law of Virginia, destroyed the payment made under it, revived the debt, and gave a right of recovery against the debtor notwithstanding the payment by him into the State treasury under the authority of the State law, and the court gave the plaintiff a judgment for the amount of the debt. There are other cases to the same effect. See Hauenstein *vs.* Lynham, 100 U. S., 483; U. S. *vs.* Peggy, 1 Cranch, 103; Fellows *vs.* Blacksmith, 19 Howard, 366.

There can be no doubt but what the United States may enter into treaty relations with an Indian tribe, and that the
62 treaty provisions are binding alike both upon the Government and the Indians to the same extent that they would be in case of a treaty made with one of the civilized nations. Thus, in the case of Worcester *vs.* Georgia, 6 Peters, Chief Justice Marshall, in speaking of the treaty relations with these Indian tribes, says: "The very term nation, so generally applied to them, means a people distinct from others. The Constitution by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words treaty and nation are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to the Indians as we have applied them to the other nations of the earth. They are ap-

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plied to all in the same sense." Again, in the case of Fellows *vs.* Blacksmith, 19 Howard, Mr. Justice Nelson, delivering the opinion of the court, said: "An objection was taken on the argument to the validity of the treaty on the ground that the Tonawanda band of the Senaca Indians were not represented by the chiefs and head men of the band in the negotiation and execution of it (referring to the treaty), but the answer to this is that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress."

If any doubt existed as to the power and competency of these Indian tribes to enter into treaty relations with the Government prior to the decision just quoted, the question was certainly set at rest by these cases. Be that as it may, however, it is well settled that this court has no power to question it. When a treaty
63 has been ratified by the proper formalities it is by the Constitution, the supreme law of the land, and the courts have no power to inquire into the authority of the persons by whom it was entered into on behalf of the foreign nation. Doe *vs.* Braden, 16 Howard, 633. There can be no doubt, I think, of the power of the United States to enter into the particular treaty stipulation here involved. It violates no provision of the Constitution nor is it in any way inconsistent with the nature and structure of the Government or of the objects for which it was formed, and falls, therefore, strictly within the limits of the treaty-making power.

This right to hunt (although not always expressed in the same language) has been recognized and expressly granted in various treaties made with Indian tribes ever since the foundation of the Government.

See article 11, treaty with Kiowas and Comanches.
Article 11, treaty with the Cheyenne Indians.
Article 11 of the treaty with the Sioux Indians.
Article 4 of the treaty with the Crow Indians.
Article 2 of the treaty with the Northern Cheyenne and Arapahoe Indians.
Article 9 of the treaty with the Navajo Indians.

That this stipulation of the treaty that the Indians shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon was considered important by the parties to the treaty in question finds support in the fact that this or similar provisions are found in almost every Indian treaty.

The manner and habits of life of these Indians are matters of common knowledge, and it is not difficult to understand how they would consider this right or privilege to hunt of supreme importance to them and why in negotiating a treaty they would insist that this right be recognized and guarantied to them.

64 This treaty was entered into long prior to the admission of Wyoming as a State, and this brings us to a consideration

of the question of whether or not the provision under consideration remains in full force and effect within the territorial limits of the State notwithstanding the changed conditions. As we have already seen, the power to make treaties is by the Constitution expressly delegated to the United States and prohibited to the States, and that a treaty executed and ratified by the proper formalities is the supreme law of the land, and that so long as the treaty provision is in force any State law in conflict with it must give way to its superior authority because the power to abrogate or place limitations upon the treaty provisions is by the Constitution expressly delegated to the United States and prohibited to the States. The power, therefore, and the only power, which can abrogate the treaty or any provision of the treaty is the treaty-making power, the United States. The act admitting Wyoming into the Union admits it upon an equal footing with the original States and makes no reservation whatever regarding the treaty relations then existing between the United States and these Indians, neither does it in express terms abrogate the treaty or any of its provisions; hence if the treaty provisions have been abrogated or repealed by the act admitting Wyoming into the Union of States, it is by implication because of inconsistent congressional legislation. While repeals by implication are not favored, yet that treaty provisions are repealed by subsequent inconsistent congressional legislation is well settled.

See U. S. *vs.* Ward, 1 Woolworth, 17; U. S. *vs.* McBratney, 104 U. S., 621; Cherokee Tobacco, 11 Wallace, 616.

The rule was clearly stated by Judge Hoffman in the case of *In re* Chin A On and others, 18 Fed., 506, in the following words: "It is not disputed that if the stipulations of the treaty and the
65 requirements of the act of Congress are found to be irreconcilably conflicting, it is the duty of the court to obey the law, as being the latest expression of the legislative will, and to leave the question of the breach of the treaty stipulation to be settled by the political branch of the Government; but before we can impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested."

It was urged at the argument that upon the admission of the State the preservation of game was within the police power of the State, it having always been within the police power of the original States to regulate the taking and killing of game and fish; and therefore upon its admission as a State Wyoming became possessed with a like police power, without which it would not be upon an equal footing with the original States; that the possession of this police power in the new State upon its admission was inconsistent with the exercise of any authority on the part of the United States over such game and fish and inconsistent with any unrestrictive right in the Indians or any other persons to hunt or fish within the State, and therefore necessarily repealed or abrogated any treaty or congressional enactment upon this subject. It is undoubtedly true that upon its admission into the Union Wyoming became vested with

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all the powers of a sovereign State, and among the powers thus conferred was the police power under which the State may unquestionably pass laws which are essential to public safety, health, and morals. Thus it has been held that the State may pass laws providing for the destruction of decayed or unwholesome food, the slaughter of diseased cattle, prohibition of wooden buildings in cities, placing restrictions upon objectionable trades to certain localities, compulsory vaccination of children, the confinement of the insane or those afflicted with contagious diseases,
66 prohibition of gambling houses and places where intoxicating liquors are sold, etc. The limitations upon this power are, first, that the interests of the public generally as distinguished from those of a particular class require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. Under this power the State has the unquestioned right to pass laws placing restrictions and limitations upon the time and manner of taking wild game and fish. In the case of Lawton *vs.* Steele, 152 U. S., 133, Mr. Justice Brown, speaking for a majority of the court, says: "The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale and prescribing the time and manner in which fish may be caught have been repeatedly upheld by the courts." The wisdom of such legislation is apparent. The killing of game at certain seasons of the year tends to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. Another sovereign power which is even broader than the police power, if possible, is the power to impose taxes, as stated by Judge Cooley in his work on Constitutional Limitations at page 479: "The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation, to every object of industry, use, or enjoyment, to every species of possession, and it imposes a burden which, in cases of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading and at no point does the power of the Gov-
67 ernment affect more constantly and intimately all the relations of life than through the exactions made under it;" but that these powers are subject to the right of the General Government to exercise the power conferred upon it by the Constitution is perfectly clear. Thus in the case of Worcester *vs.* The State of Georgia, Mr. Justice Washington says: "The State claims the right of sovereignty commensurate with her territory, and the United States claim it in their proper sphere to the extent of the Federal limits. This right or power in some cases may be exercised, but not in others."

The power to dispose of the public domain is undoubtedly an attribute of sovereignty; yet a new State cannot dispose of the lands

within its limits which are owned by the Federal Government. The power to tax is also an attribute of sovereignty, but a new State cannot tax the lands of the United States.

Judge Cooley in his work on Constitutional Limitations, discussing this subject, says: "In American constitutional law, however, there is a division of the powers of sovereignty between the national and State governments by subjects, the former being possessed of supreme, absolute, and uncontrol-able power over certain subjects throughout all the States and Territories, while the States have the like complete power within their respective territorial limits over other subjects. In regard to certain other subjects the States possess powers of regulation which are not sovereign powers, inasmuch as they are liable to be controlled or for the time being to become altogether dormant by the exercise of a superior power vested in the General Government in respect to the same subjects."

The power to levy and collect taxes is undoubtedly a power which a State may properly exercise, as is also the authority to regulate the taking of game under the police power. Both are un-
68 questionably sovereign powers possessed by the States, and, as it seems to me, stand upon an equal footing. Certainly the exercise of the police power is not superior to the power to collect taxes, for the very existence of the State government depends upon its power to provide a revenue by taxation for the purpose of maintaining the State government; yet it was held by the Supreme Court in the case of the New York Indians—5 Wallace, 761—that a law passed by the State of New York which provided for taxing certain Indian lands was void because in conflict with the terms and provisions of a treaty exempting these lands from taxation, entered into between the United States and the Seneca Indians. See also case of Kansas Indians, 5 Wallace, 737.

While it is true Kansas accepted her admission into the Union on condition that the Indian rights should remain unimpaired, and that the General Government might make any regulation respecting them, their lands, property, or rights which it might have been competent to make if Kansas had not been admitted into the Union, yet, I think, the case following in the same volume of the New York Indians shows clearly that in the absence of such a provision as that contained in the act admitting Kansas the judgment would necessarily have been the same. Both cases turn upon the question of the conflict between the State law and the provisions of a treaty. Numerous cases might be cited where it has been held that a State law in conflict with the provisions of a treaty must give way, but I shall not take the time to discuss them. See *In re* Perret, 1 Federal, 481; Baker *vs.* Portland, 2 Federal, 473; People *vs.* Gerke and Clark, 5 California, 381.

It is urged that the act of Congress admitting Wyoming into the Union being of a later date that the treaty by implication necessarily repeals or abrogates the treaty in so far as the treaty pro-
visions conflicted with the right of the State to exercise any
69 of its sovereign powers. As we have already seen, subsequent inconsistent congressional legislation would have that

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effect unless both the congressional legislation and the treaty can by fair construction be made to stand together and reasonable effect given to both. Where it is possible to give effect to both that construction must be adopted. Henderson Tobacco, 11 Wallace, 652.

But, bearing in mind the division of the powers of sovereignty under our system of Government between the national and State governments, can reasonable effect be given to both the treaty provisions and the act of Congress admitting the State? It would seem perfectly clear that if the United States had the right by virtue of the treaty-making power conferred upon it by the Constitution to take away from a sovereign State, after its admission into the Union, the power to levy taxes upon the lands of Indians within the State, it would certainly have that power prior to the admission of the State into the Union, and that the treaty provision would be in full force after admission unless the act of Congress admitting the State was so inconsistent with the provisions of the treaty that it furnished an exclusive rule so that the court could not, by fair construction, give effect to both. The same rule applies, it seems to me, to an exercise of the police power of the State. The Constitution expressly delegates to the United States exclusive jurisdiction to regulate intercourse with the Indians, and the power thus delegated may be exercised by the Government either by legislative enactment or under the treaty-making power conferred upon it by the Constitution. In the absence of congressional legislation or a treaty with the Indians they would doubtless be subject to the provisions of the State law, but no such question arises in this case. We are here dealing with a question which has been the subject of treaty stipulation between the National Government and this
70 tribe of Indians. In the case of Worcester *vs.* The State of Georgia Mr. Justice Washington, who delivered a concurring opinion in that case, said: "A State claims the right of sovereignty commensurate with her territory, as the United States claim it in their proper sphere to the extent of the Federal limits. This right or power in some cases may be exercised, but not in others. Should a hostile force invade the country at its most remote boundaries it would become the duty of the General Government to expel the invaders; but it would violate the solemn compact with the Indians without cause to dispos-ess them of rights which they possess by nature and have been uniformally acknowledged by the Federal Government."

Again, in the course of his opinion the same learned judge says: "Why may not a State coin money, issue bills of credit, enter into a treaty of alliance or confederation, or regulate commerce with foreign nations? Because these powers have been expressly and exclusively given to the Federal Government. Has not the power been as expressly conferred on the Federal Government to regulate intercourse with the Indians, and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians exercising the right of self-government, and consequently include those who reside within the limits of a State as well

as others. Such has been the uniform construction of this power by the Federal Government and of every State government until the question was raised by the State of Georgia."

Wyoming was admitted upon the same footing with the original States. Does it put it upon any other or different footing to say that it cannot so exercise this power that it will affect persons or subjects which are within the treaty-making power conferred upon the United States by the Constitution and which have
71 been, as in the case at bar, the subject of treaty stipulation?

In the case against the State of Georgia the court said: "When Georgia sanctioned the Constitution and conferred on the national legislature the exclusive right to regulate commerce or intercourse with the Indians, did she reserve the right to regulate intercourse with the Indians within her limits? This will not be pretended. If such had been the construction of her own powers would they not have been exercised? Did her senators object to the numerous treaties which have been formed with the different tribes who lived within her acknowledged boundaries?

Why did she apply to the executive of the Union repeatedly to have the Indian title extinguished, to establish a line between the Indians and the State, and to procure a right of way through the Indian lands?"

Here, then, we have a sovereign State admitted into the Union on an equal footing with the original States, whose authority is just as full and complete to levy taxes, to exercise the police power and all other sovereign powers reserved to the States as was the authority of the original States, and subject only to the right of the General Government to exercise all of the powers granted to it by the Constitution.

In the case of the New York Indians it was held not to be inconsistent with State sovereignty to say that the lands of certain Indians within the State should not be subject to taxation by the State because of the treaty stipulation exempting them from taxation, and in this case does not the same principal apply? Here we have a treaty stipulation guarantying to these Indians, in consideration of a surrender by them to the Government of certain rights which were recognized by the Government as rights, that they should be permitted to hunt upon the public lands of the United States "so long as game may be found thereon;" that this was considered by the parties to the treaty an important right to these Indians cannot be questioned, as it has been the subject of treaty stipulation in almost every treaty made
72 with the Indians. Is it any more inconsistent with State sovereignty to say by treaty provision that Indians shall have the right to hunt upon the unoccupied lands of the United States within a State than it is to say by treaty stipulation that their lands within a State shall not be subject to taxation by the State? I think not. Under the division of the powers of sovereignty between the national and State governments, which the court feels bound to recognize as applicable to this case, I am forced to the conclusion that the act admitting Wyoming into the Union

of States is not so inconsistent with the provisions of the treaty as to make it impossible for the court by fair construction to give effect to both, as was undoubtedly true in the cases of The U. S. *vs.* McBratney and the Cherokee Tobacco. Applying the rules of construction which I think must be applied to this treaty and to the act of Congress admitting Wyoming, I am inclined to the view that effect can be given to both, and therefore that the act admitting Wyoming into the Union does not by necessary implication repeal or abrogate the treaty, and that the treaty provision remains in force.

The State law being in conflict with the provisions of the treaty, it cannot be enforced against these Indians, parties to the treaty. The petitioner must therefore be discharged, and it is so ordered.

73 THE UNITED STATES OF AMERICA, } *ss:*
District of Wyoming, }

I, Louis Kirk, clerk of the circuit court of the United States of America for the district of Wyoming, by virtue of the appeal allowed in the cause herein named and in obedience to the order allowing such appeal, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings had in said court in the matter of the application of Race Horse for a writ of *habeas corpus* as full and complete as the same remain of record and on file in my office.

And I further certify that I annex to and transmit with the said record a true copy of the opinion of the circuit court filed in this case on the twenty-first day of November, A. D. 1895.

Seal United States Circuit Court, District of Wyoming.

Witness my hand and the seal of said court, at the city of Cheyenne, in said district, this fourth day of January, A. D. 1896

LOUIS KIRK, *Clerk.*

Endorsed on cover: Case No. 16,131. Wyoming C. C. U. S. Term No., 841. John H. Ward, sheriff of the county of Uinta, in the State of Wyoming, appellant, *vs.* Race Horse. Filed January 9, 1896.

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FILED,
JAN 20 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN H. WARD, SHERIFF OF THE county of Uinta, in the State of Wyoming, appellant,
v.
RACE HORSE.

No. 841.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

MOTION TO ADVANCE.

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In the Supreme Court of the United States.

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JOHN H. WARD, SHERIFF OF THE county of Uinta, in the State of Wyoming, appellant,
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RACE HORSE.

No. 841.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

MOTION TO ADVANCE.

A petition for habeas corpus was filed in the circuit court of the United States for the district of Wyoming by the United States district attorney, acting under instructions of the Attorney-General, in behalf of Race Horse, a Bannock Indian, against the sheriff of the county of Uinta, in the State of Wyoming.

The Bannock Indians made a treaty with the United States of America on the 3d day of July, 1868, of which Article IV provided as follows:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on

> their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they will have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

The petitioner was a member of said tribe at the time of making said treaty, and has been at all times and still is a member thereof, and has at all times maintained his tribal relations.

The petition represents that on the 1st day of July, 1895, in the county of Uinta, in the State of Wyoming, petitioner killed seven elk at a point about 20 miles south of Mount Hoback, and about 60 miles distant from any ranch or settlement of any kind, and upon the unoccupied lands of the United States of America; that the said lands over which he was at the said time hunting were lands over which the said tribe of Indians had, for a great many years past, been hunting; that he killed the said seven elk for the purpose of furnishing means of subsistence for his family and other members of said tribe of Bannock Indians; that at said time game was found upon the said lands and peace subsisted among the whites and Indians on the borders of the hunting districts.

The petition further shows that for the killing of said elk the said petitioner was, in October, 1895, indicted in the district court of said State, and that he was, under process of said court, by the defendant, unlawfully and

wrongfully held in custody, and in violation of the rights guaranteed to petitioner by the laws and Constitution of the United States.

The petition shows that said indictment was founded upon an act of the State of Wyoming, being chapter 98 of the Session Laws of 1895, entitled, "An act for the protection of game and fish."

Such steps were taken in the proceeding that his honor John A. Riner, United States district judge for Wyoming, ordered the said prisoner to be discharged.

From this order the sheriff has appealed to this court.

It is a matter of the utmost importance to the Bannock Indians, and to the State of Wyoming, that the question of the right of said Indians under the treaty to hunt over the public lands of the United States lying without their reservation should be speedily determined.

It is a matter of public history that, growing out of the very matters involved in this suit, a number of Indians were killed by an officer of the State of Wyoming and those acting under him last summer, and that, as a result, it was apprehended that there would be a serious outbreak of the Indians, caused by what they deemed a violation of their rights.

There is filed herewith a consent that this cause be advanced made in writing by the counsel for appellant, as follows:

In the Supreme Court of the United States.

JOHN H. WARD, AS SHERIFF OF UINTA COUNTY, WYOMING, appellant,
v.
RACE HORSE, APPELLEE.

Consent of appellant to advancement of case on docket.

Comes now said appellant, John H. Ward, as sheriff of Uinta County, Wyo., and hereby consents that this case may be advanced upon the docket, for the purpose of having an early hearing therein, and an early determination thereof, as prayed in the motion of the appellee for such advancement.

BENJAMIN F. FOWLER,
JOHN W. LACEY,
WILLIS VAN DEVANTER,
Counsel for Appellant.

Wherefore, the Attorney-General respectfully moves the court to advance the cause on the docket, and assign it for hearing on such day during the term as may be convenient to the court.

JUDSON HARMON,
Attorney-General.
J. M. DICKINSON,
Assistant Attorney-General.

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IN THE

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RACE HORSE.
No. 841

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

BRIEF AND ARGUMENT FOR APPELLANT, BY BENJAMIN F. FOWLER AND WILLIS VAN DEVANTER.

PRESS OF THE E. A. BRISTOL CO., CHEYENNE, WYO.

There is filed herewith a consent that this cause be advanced made in writing by the counsel for appellant, as follows:

In the Supreme Court of the United States.

JOHN H. WARD, AS SHERIFF OF UINTA COUNTY, WYOMING, appellant,
v.
RACE HORSE, APPELLEE.

Consent of appellant to advancement of case on docket.

Comes now said appellant, John H. Ward, as sheriff of Uinta County, Wyo., and hereby consents that this case may be advanced upon the docket, for the purpose of having an early hearing therein, and an early determination thereof, as prayed in the motion of the appellee for such advancement.

BENJAMIN F. FOWLER,
JOHN W. LACEY,
WILLIS VAN DEVANTER,
Counsel for Appellant.

Wherefore, the Attorney-General respectfully moves the court to advance the cause on the docket, and assign it for hearing on such day during the term as may be convenient to the court.

JUDSON HARMON,
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PRESS OF THE S. A. BRISTOL CO., CHEYENNE, WYO.

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OCTOBER TERM, 1895.

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vs.
RACE HORSE.
No. 841.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal taken from the Circuit Court direct to the Supreme Court under Section 5 of the act entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdic-

tion of the courts of the United States, and for other purposes", approved March 3, 1891.

July 3, 1868, a treaty was concluded at Ft. Bridger, Utah, between the United States of America and the Eastern Band of Shoshonees and the Bannock tribe of Indians (15 U. S. Stats., 673). In Article II of this treaty, in addition to setting apart for the use of the Shoshonees a definite reservation within what subsequently became Wyoming, it was provided:

> It is agreed that whenever the Bannocks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" countries.

In pursuance thereof, the Fort Hall reservation in Idaho was set apart for the use of the Bannocks.

Article IV of the treaty provides:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

July 25, 1868, Congress passed "An Act to provide a temporary government for the Territory of Wyoming" (15 U. S. Stats., 178), in Section 1 of which it was provided:

> Nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians.

July 10, 1890, Congress passed "An act to provide for the admission of the State of Wyoming into the Union and for other purposes", (26 U. S. Stats., 222, Section 1 of which provides:

> The State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified and confirmed.

This act contains no exception or reservation made in favor of, or for the benefit of, Indians.

February 20, 1895, the legislature of the State of Wyoming passed "An Act for the protection of game and fish," (Laws of Wyoming, 1895, p. 225), sections 6 and 14 of which (printed record, p. 30) are as follows:

> SEC. 6. The wanton destruction or the wasting

of the game and fish of this State during any period of time when the taking or capture of such game or fish is permitted is hereby prohibited and declared a misdemeanor; and any person who shall at any time take, capture or destroy any game or fish in excess of the number or quantity thereof which he can immediately use for food purposes shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten, nor more than fifty dollars and costs of prosecution for each and every animal, bird or fish, which he or she may take or destroy, contrary to the provisions of this section.

SEC. 14. It shall be unlawful to pursue, hunt or kill any deer, elk, moose, mountain sheep, mountain goat or antelope at any time except during the months of September, October and November in each year, during which months the males only of such animals may be killed or hunted under the conditions and restrictions imposed by this section. It shall be unlawful at any time whatever to kill or capture any of the above-named animals mentioned in this section by means of any pit, pitfall or trap. Any person may, during the period permitted and prescribed by this section, pursue, hunt and kill any of the males of the animals mentioned in this section for the purpose only of supplying himself with food, but not for speculative purposes or wantonly. In order to prevent more effectively the hunting and slaughter of the animals mentioned in this section for speculative purposes, it is hereby declared to be unlawful for any non-resident of this State to

hunt, kill or pursue any of the male animals permitted by this section to be hunted, killed or pursued herein, without first having procured a license therefor, so to do from a justice of the peace of the county wherein such animals are to be hunted. The justices of the peace of this State are hereby authorized and directed to issue such licenses upon the payment of twenty dollars for each license, which shall be good in their county. Such license shall permit such non-resident to pursue, hunt or kill any of the males of the animals mentioned in this section during the months of September, October and November of the current year for the purpose of supplying himself or his family with food during such period.

October 3, 1895, the appellee, Race Horse, was arrested by the appellant as sheriff of Uinta County, Wyoming, on a criminal warrant issued upon a criminal information (which takes the place of an indictment under the Constitution and Laws of Wyoming) filed in the District Court of Uinta County, charging the appellee with the unlawful and wanton killing of seven elk in said county on July 1, 1895. The appellee, being held in custody by such sheriff in default of bail, on October 7, 1895, filed in the Circuit Court a petition for a writ of *habeas corpus*, on which the writ was granted and made returnable October 26. On the latter day the court extended the time for the return until November 2, at which time the sheriff made and filed a return to the writ, at the same time

producing the body of the appellee. An answer or reply to the return was then filed by the appellee, denying portions thereof.

The petition of the appellee (printed record, p. 1) stated that he was a Bannock Indian; that he resided at the Fort Hall Indian Reservation in Idaho; that he was born a member of the Bannock Tribe which entered into the treaty of July 3, 1868; that he was a member thereof when the treaty was made, and had at all times continued a member thereof, and still maintained tribal relations with such tribe. He admitted "that he killed the said seven elk at a point about twenty miles southeast of Mount Hoback, in Uinta County, in the State of Wyoming, on or about the first day of July, A. D. 1895", but alleged that the place of the killing was about sixty miles distant from any ranch or settlement of any kind whatsoever, and upon unoccupied lands of the United States. He stated that there was wild game in abundance upon the lands where the elk were killed; that peace subsisted between the whites and Indians, and that the elk were killed solely for the purpose of furnishing means of subsistence for himself and family and other members of said tribe during the following winter. He then set forth Article IV of the treaty, alleging that by virtue thereof he had the right, under the Constitution and laws of the United States, to hunt and kill the elk in question upon the unoccupied lands of the United

States; that the act of the legislature of Wyoming, in so far as it related to him, was null and void, as being in derogation of, and contrary to, the provisions of the treaty, and that he was restrained of his liberty by the sheriff, in violation of the Constitution of the United States and in violation of Article IV of the treaty.

The return of the sheriff (printed record, p. 8) to the writ of *habeas corpus* exhibited the criminal information and the warrant upon which he held the appellee in custody; admitted that the appellee was a Bannock Indian residing at the Fort Hall Indian Reservetion in Idaho; admitted that the alleged offense was committed at a point about twenty miles southeast of Mount Hoback on public lands of the United States, and that at the time of the commission of the offense peace subsisted between the white persons residing in that vicinity and the Bannock and other Indians, and alleged that the Fort Hall Reservation was situate sixty miles westerly from the western line of Wyoming and one hundred miles westerly from the place of the offense. The return then continued as follows:

> But I do allege that the public lands of the United States at that place and in the vicinity thereof have been surveyed, subdivided and platted by the United States and had been so surveyed, subdivided and platted long before the time of the commission of said offense, and that at the time of the commission of said offense and long before then and ever since then the said lands were open

to entry and settlement under the land laws of the United States.

And I further allege that a considerable portion of the public land of the United States in the near vicinity of the place where said offense was committed, to wit, within five (5) miles thereof, had been before the time of the commission of said offense settled upon and duly entered under the land laws of the United States and were occupied and used by the persons making such settlements and entries as homes and places of abode for themselves and their families.

And I do further allege that the place where the said offense was committed and the country adjacent thereto at the time of the commission of said offense constituted a part of the State of Wyoming and a part of the said county of Uinta and was included in and constituted a part of the school districts and election districts into which the said county had been theretofore and was then duly and regularly subdivided pursuant to the laws of the State of Wyoming.

And I do further allege that the lands at the place where the said offense was committed and in the country adjacent thereto, which were not then enclosed and fenced by settlers and entrymen thereon, were at the time of the commission of said offense used as an open and common grazing ground for the grazing of live stock by citizens of the State of Wyoming and citizens of other states who had and owned live stock in large numbers at that time grazing, running and ranging thereon.

And I do further certify that the place where the said offense was committed and the country adjacent thereto was, in the year A. D. 1895, and in other years previous thereto, divided into round-up districts pursuant to the laws of the State of Wyoming, and that the cattle ranging thereon were in the said year 1895 and other years previous thereto rounded-up, gathered and handled according to the long-established custom prevailing upon such round-ups and pursuant to the laws of said State.

* * * * * * *

And by reason of the matters and things aforesaid I deny that the said Race Horse is or has been unlawfully or wrongfully held in custody. Nevertheless, the body of the said Race Horse I have now here before this honorable court, as in said writ of *habeas corpus* commanded, to be dealt with according to law; and herewith I return the said writ of *habeas corpus* with this my return thereto.

The answer or reply of the appellee (printed record, p. 12) to the sheriff's return was as follows:

Comes now the said Race Horse and, replying to the return of John H. Ward, the respondent herein, denies—

That the public lands of the United States at the place where the killing of said elk mentioned in the petition herein occurred have been surveyed, subdivided, and platted by the United States or had been so surveyed, subdivided, and platted long before the time of the commission of

the said offense, or that at the said time or for any period before said time said lands were open to entry and settlement under the land laws of the United States.

The petitioner admits that a small portion of the lands had been so as aforesaid surveyed and platted and opened for settlement under the land laws of the United States, but that the same were and constituted a very inconsiderable portion of the entire body of public lands in that vicinity.

He denies that in the near vicinity of the place of killing said elk there were any lands which had been settled upon and entered under the land laws of the United States prior to the commission of said offense.

He denies that there were any ranches or settlements of any kind within five miles of said place; but, on the contrary, he alleges the fact to be that the said act of killing said elk was committed at a point much more than five miles distant from any ranch or settlement whatever.

The case was tried before the court, and the matter taken under advisement until November 21, 1895, when the court (printed record, p. 15) found that the petitioner was held in custody for an act done in pursuance of the said treaty and was in custody in violation of the Constitution and laws of the United States, and ordered the prisoner discharged from custody.

After the rendering of the judgment discharging the appellee, and on the same day, the appellant presented to the court his petition for the allowance af an appeal

to the Supreme Court (printed record, p. 16); filed an assignment of errors (printed record, p. 17), and an appeal to the Supreme Court was then allowed in open court (printed record, p. 19), and a cost bond was executed with the approval of the court. Pending the appeal, the appellee was enlarged upon his recognizance.

Under Sec. 765, U. S. Rev. Stats., and for the purpose of preserving and transmitting to the Supreme Court upon such appeal the entire proceedings in the Circuit Court, it was ordered that the appellant have until December 16, 1895, within which to present for allowance a bill of exceptions containing the evidence produced upon the hearing; and within the time so fixed such bill of exceptions was presented and allowed and ordered made a part of the record (printed record, pp. 21-25).

The opinion delivered by the judge on discharging the appellee will be found in the record at page 25, and also in 70 Fed. Rep., p. 598.

ERRORS ASSIGNED AND RELIED UPON.

The errors assigned by the appellant (printed record, p. 17) are as follows:

1. The court erred in discharging the said petitioner, Race Horse, when the writ of *habeas cor-*

pus should have been discharged and the petitioner remanded to the custody of the said Ward as such sheriff.

2. The court erred in holding that the right to hunt granted to the petitioner, Race Horse, and other Bannock and Shoshone Indians under Article IV of the treaty mentioned in the petition and the return herein was not subject to regulation under the police power of the State of Wyoming.

3. The court erred in holding that the place of the commission of the offense with which the said Race Horse was charged and held in custody under the laws of the State of Wyoming was "unoccupied lands of the United States" within the meaning of Article IV of the treaty aforesaid.

4. The court erred in construing Article IV of the treaty aforesaid in holding that the right to hunt granted therein was absolute and not subject to regulation under the police power of the State of Wyoming.

5. The court erred in construing Article IV of the treaty aforesaid in holding that the place of the commission of the offense with which the said Race Horse was charged and held in custody under the laws of the State of Wyoming was "unoccupied lands of the United States" within the meaning of Article IV of the treaty aforesaid.

6. The court erred in holding that the provision relating to the right of the Indians to hunt contained in Article IV of the treaty aforesaid gave to and preserved in the petitioner, Race Horse, and other Bannock and Shoshone Indians, the right to hunt and kill game at the place in

question and within the State of Wyoming, notwithstanding the act of admission of the State of Wyoming passed by the Congress of the United States.

7. The court erred in holding that the provision relating to the right of the Indians to hunt contained in Article IV of the treaty aforesaid was not repealed, abrogated, or modified by the act of Congress admitting the State of Wyoming into the Union.

8. The court erred in holding that the statute of the State of Wyoming regulating the killing and taking of game was in violation of Article IV of the treaty aforesaid, and therefore void and of no effect as against the Bannock and Shoshone Indians named in such treaty.

BRIEF AND ARGUMENT.

1. *The place of the commission of the offense with which Race Horse was charged, and for which he was held in custody was not "unoccupied lands of the United States" within the meaning of Article IV of the Treaty.*

The return contained the following allegations, none of which were controverted or denied by the answer or reply of the appellee:

> Said reservation (Fort Hall Indian Reservation) is situate about sixty miles westerly from the west-

ern boundary line of the State of Wyoming and about one hundred miles westerly from the place of the commission of the offense with which the said Race Horse is charged as aforesaid.

* * * * * * *

And I do further allege that the place where the said offense was committed and the country adjacent thereto at the time of the commission of said offense constituted a part of the State of Wyoming and a part of the said county of Uinta and was included in and constituted a part of the school districts and election districts into which the said county had been theretofore and was then duly and regularly subdivided pursuant to the laws of the State of Wyoming.

And I do further allege that the lands at the place where the said offense was committed and in the country adjacent thereto, which were not then enclosed and fenced by settlers and entrymen thereon, were at the time of the commission of said offense used as an open and common grazing ground for the grazing of live stock by citizens of the State of Wyoming and citizens of other states who had and owned live stock in large numbers at that time grazing, running and ranging thereon.

And I do further certify that the place where the said offense was committed and the country adjacent thereto was, in the year A. D. 1895, and in other years previous thereto, divided into round-up districts pursuant to the laws of the State of Wyoming, and that the cattle ranging thereon were in the said year 1895 and other years previ-

> ous thereto rounded-up, gathered and handled according to the long-established custom prevailing upon such round-ups and pursuant to the laws of said State.

These allegations, not being denied, were admitted, and therefore stand as established facts in the case. A return to a writ of *habeas corpus* imports verity until impeached.

In Crowley v. Christensen, 137 U. S., 86, it is said:

> At common law no evidence was necessary to support the return. It was deemed to import verity until impeached. * * And this rule is not changed by any statute of the United States.

The evidence produced upon the hearing also established that the *locus in quo* was used as a common grazing ground or range for large numbers of native cattle; that in that vicinity there were six ranches, two stores, one blacksmith shop and one sawmill, occupied and maintained by white settlers and their families; that these people voted at the general election held in 1894; that there was a settlement of three hundred people about thirty miles to the south, and a large settlement at Marysvale to the northwest; that the lands in the vicinity were surveyed lands, and that Race Horse at the time of the killing of the elk, visited the store at Fayler's ranch. (Testimony of Charles Bellamy, Race Horse, J. Frank Warner, John H. Ward and William A. Richards.)

By universal custom, two round-ups are held each year upon all cattle ranges in Wyoming: one in May or June, for the purpose of gathering and branding the calves of that season, and the other in the fall, for the purpose of gathering and driving to place of shipment cattle fitted for market. The Spring round-up is sanctioned by express provisions of law (Laws of Wyoming, 1890-91, secs. 14-16, p. 152.) These round-ups are conducted by commissioners and foremen appointed under the laws of the State, and it is their duty on their respective round-ups to see that all calves are branded with the brand of the mother, and that all unbranded and unclaimed cattle are gathered and sold as estrays for the benefit of the State.

The *locus in quo* of the offense, in addition to being within the State of Wyoming, was then embraced within and occupied by a county government, school districts, election districts and round-up districts; was open to settlement; was settled by a small but increasing population, and was employed by citizens of Wyoming and other States as a common grazing ground for the grazing and handling of large numbers of live stock owned by them.

Webster says "occupy" means "to employ, to use". That which is not employed and not used would be "unoccupied", and that which is employed and used is occupied, and, therefore, not "unoccupied".

Respecting the occupancy of public lands for graz-

ing purposes, in Buford v. Houtz, 133 U. S., 320, the court, at page 326, says:

> We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids their use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.
>
> The whole system of the control of the public lands of the United States as it had been conducted by the government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable. They have always been open to sale at very cheap prices. Laws have been enacted authorizing persons to settle upon them and to cultivate them before they acquire any title to them. While in the incipiency of the settlement of these lands, by persons entering upon them, the permission to do so

was a tacit one, the exercise of this permission became so important that Congress, by a system of laws called the pre-emption laws, recognized this right so far as to confer a priority of the right of purchase on the persons who settled upon and cultivated any part of this public domain. During the time that the settler was perfecting his title, by making the improvements which the statute required and paying, by instalments or otherwise, the money necessary to purchase it, both he and all other persons who desired to do so had full liberty to graze their stock upon the grasses of the prairies and upon other nutritious substances found upon the soil.

The value of this privilege grew as the population increased, and it became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep, and raising them and fattening them for market upon these unenclosed lands of the government of the United States. Of course the instances became numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain unenclosed and in no way separated from the lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States and upon the unenclosed lands of the private individual, without let or hindrance. The owner of a piece of land, who

> had built a house or enclosed twenty or forty acres of it, had the benefit of this universal custom, as well as the party who owned no land. Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze.

The language of the treaty is not "*unappropriated* lands of the United States", but is "*unoccupied* lands of the United States". It is submitted that lands over which state, county and school district governments have been extended and are being maintained, lands which are embraced within election districts having electors who exercise the elective franchise, lands which are embraced within round-up districts over which round-ups are operated by custom and by law, lands which are employed and used for the herding, grazing, growing and fattening of live stock in large numbers, lands sparsely and yet actually settled, and having larger settlements adjoining them, are not "*unoccupied*" within the meaning of the treaty.

The meaning of a word is often qualified, restricted or enlarged by the connection in which it is used. The permission to hunt given to the Indians is couched in the following language:

> But they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

The words "hunting districts" here used are necessarily the equivalent of the words "unoccupied lands of the United States", and reference may well be made to the former to ascertain what was meant by the latter. The hunting districts referred to do not include all such districts, but only those which are outside of white and Indian settlements. The Indians referred to are the Indians to whom the hunting privilege is given. It would be unreasonable to believe that it was intended that these Indians, by virtue of this treaty provision, should be permitted to hunt on the unoccupied lands of the United States in Florida, Mississippi, Indiana, Michigan, or elsewhere greatly remote from the reservations upon which, by the treaty, they were being established and located. By the preceding portion of Article IV it is agreed that the Indians "will make said reservations their permanent home". If these reservations were to be their permanent homes, and the lands upon which they were to be permitted to hunt were hunting districts on the borders of which they were located, then such hunting districts were obviously those adjoining, or in the vicinity of the reservations so established as permanent Indian homes. Again, a particular purpose and object to be obtained by means of the treaty was the location and confinement of these Indians upon fixed reservations.

Mr. Browning, the Secretary of the Interior, in his report of 1867 to the President, at p. 10 says:

> Our Indian relations have assumed a new and interesting aspect. The steady approach of emigration to the grounds heretofore devoted to the chase, and the rapid progress of the railroads pointing towards the Pacific and traversing the country over which the Indians from time immemorial have roamed, imperiously demand that the policy of concentrating them upon reservations should, whenever practicable, be adopted. Until recently there was territory enough to supply the demands of the white race, without unduly encroaching upon the districts where the Indians subsisted by hunting. This condition of things no longer exists.
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> * * * * * * *
>
> A consideration of the proper policy to be pursued in respect to the wild tribes presents more difficult questions. As long as they cling to their nomadic habits and subsist by hunting and fishing, encroachment upon their hunting grounds—and it does not seem possible to prevent it—will necessarily lead to hostilities and a devastation of the frontier settlements.

The Act of July 20, 1867, (15 U. S. Stats., 17), under which the treaty in question was negotiated, provided:

> That said commissioners are required to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky Mountains. * * * Said district or districts, when so selected and the selection ap-

> proved by Congress, shall be and remain permanent homes for said Indians, to be located thereon, and no persons not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested except officers and employes of the United States.

The treaty itself, in Article II, after providing for the establishment of a reservation for the Bannocks, with privileges, rights and duties like those of the Shoshonees, and after establishing a reservation for the Shoshonees, provides that such reservation:

> Shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

The history of the times, the act authorizing the negotiation of the treaty and the treaty itself show that

there was a fixed purpose and intention to remove the Indians beyond the frontier settlements: to confine them to established reservations, and to accomplish and maintain a complete separation between the whites and Indians. While it was the intention to secure mutual protection to the whites and Indians, the evident belief and intention of the parties to the treaty, which is everywhere apparent in the treaty provisions, was that such protection could be best secured and only secured by accomplishing and maintaining such separation. In the light of this, it seems clear that the lands over which it was intended that the Indians should be permitted to hunt were those beyond and outside of white settlements. And, considering that the wandering habits of the Indians were intended to be checked, it was equally intended that the lands over which they would be permitted to hunt were those bordering upon, and in the vicinity of, their permanent home, the reservation.

The language "so long as peace subsists among the whites and Indians on the borders of the hunting districts", are not merely words of limitation but are words of description as well. They assume that there were whites and Indians on the borders of the hunting districts. The reasonable construction, then, of Article IV of the treaty is that the reservations established thereunder were to be the permanent homes of the Indians named; and these reservations being beyond the fron-

tier and away from white settlements, the Indians were to be permitted to leave the reservations only temporarily for the purpose of hunting in that region of country lying between the reservations and the frontier settlements; that is, bordered by the Indians upon one side and bordered by the whites upon the other. The treaty provision clearly shows that the hunting districts in which the Indians were to be permitted to hunt were not such as were settled by white people, because the provision is that the hunting privilege should be enjoyed "so long as peace subsists between the whites and Indians on the borders of the hunting districts". No provision is made respecting whites *in* the hunting districts. It was just as important and just as essential for the protection of the Indians and for the protection of the whites that peace should subsist with the whites *in* the hunting districts, if there were any, as with the whites outside, that is, *on the borders*, of the hunting districts. The treaty, therefore, in desicrbing the hunting districts, deliberately contemplates a place without white residents, and bordering the Indians on one side and the whites upon the other. After making such careful provision for the whites on the borders of the districts, the whites in the districts would not have been ignored and left wholly unprovided for and unprotected if the hunting districts contemplated by the treaty had included a region settled by whites.

A treaty, like any other law, should be read, inter-

preted and construed with reference to the conditions existing at the time of its adoption. This treaty was concluded July 3, 1868. The act to provide a temporary government for the Territory of Wyoming was passed July 25, 1868, but the territory was, in fact, not organized, under Sec. 17 of the act, until May 19, 1869. (Laws of Wyoming, 1869, Preface, page iv).

The first act including within a county the place now in question was passed December 1, 1869 (Laws of Wyoming, 1869, p. 382). At the time of the concluclusion of the treaty, it is doubtful whether there was a white person living within what is now Uinta County except at Fort Bridger, which was located in the extreme southern part thereof. At that time the Union Pacific Railroad was rapidly building toward, and soon thereafter reached, that section. By the census of 1870, Uinta County had a total population of 856; by the census of 1880, 2,879, and by the census of 1890, 7,881. (Compendium of the Eleventh Census, 1890, Part I, Population, page 47).

The treaty did not contemplate, nor did it provide, that what was then a hunting district should always continue a hunting district. No region of country was thus condemned. To do so would have been contrary to the established policy of the government in encouraging the settlement and development of the western country.

While the *locus in quo* of the offense with which

Race Horse was charged was not at the time of the commission thereof thickly settled by whites, it was nevertheless, actually settled by *bona fide* residents and their families, who had constructed homes and were engaged in stock-raising, merchandising, lumbering and other pursuits incident to a permanent settlement and development of the country. In the near vicinity there were large and thriving settlements, and between that place and the Fort Hall Indian Reservation is a well-settled portion of Idaho. This settlement was with the encouragement and at the invitation of the United States; and, as shown by the evidence in this case and by the census, that settlement is continually and rapidly increasing. Such a place was not "unoccupied lands of the United States" within the contemplation of the parties to the treaty at the time when the same was made and concluded, and is not so now.

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2 *Game and fish, by the English common law, were the property of the crown, and in the States of the United States they are the property of the people of such States. The State may exclusively control their taking and capture, the same as it may control its other property.*

In Magner v. People, 97 Ill., 320, in passing upon

the statute of that State, enacted for the protection of game and birds, the court, at page 333, says:

> No one has a property in the animals and fowls denominated "game," until they are reduced to possession. 2 Kent's Com. (8th ed.) 416, *et seq.*; Cooley on Torts, 435. Whilst they are untamed and at large, the ownership is said to be in the sovereign authority—in Great Britain, the king,—2 Blackstone's Com. (Sharswood's ed.) 409-10,—but with us, in the people of the State. The policy of the common law was to regulate and control the hunting and killing of game, for its better preservation: and such regulation and control, according to Blackstone, belong to the police power of the government. 4 Com. (Sharswood's ed.) 174.
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> * * * * * * *
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> The ownership being in the people of the State—the repository of the sovereign authority—and no individual having any property rights to be affected, it necessarily results, that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare.
>
> Stated in other language, to hunt and kill game, is a boon or privilege granted, either expressly or impliedly, by the sovereign authority—not a right inhering in each individual; and, consequently, nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to

> say that the ownership of the sovereign authority is *in trust* for all the people of the State, and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use, in the future, to the people of the State. But in any view, the question of individual enjoyment is one of public policy, and not of private right.

This matter was again before the same court in Adams Express Co. v. People, 133 Ill., 649, and the position here announced was fully affirmed.

In Gentile v. State, 29 Ind., 409, in passing upon the act of that State to provide for the preservation of fish, the court, at page 417, says:

> But fish are *ferœ naturæ*, and as far as any right of property in them can exist, it is in the public, or is common to all. No individual property in them exists until they are taken and reduced to actual possession. 2 Black. Com. 392. They are natives of the water; it is there they generate and live and grow, and no individual property in them can attach whilst they remain there free. But, as they are valuable for food, the public has an interest in their protection and growth.

In *Ex parte* Maier, 103 Cal., 476, in considering a statute adopted for the protection of deer and other game, the court, at page 483, says:

> The wild game within a State belongs to the people in their collective sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may,

> if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.

Chambers v. Church, 14 R. I., 398, involved the validity of a contract to make fish-oil in violation of a statute of Virginia prohibiting non-residents from taking or catching fish in waters of that Commonwealth for the purpose of manufacturing oil or manure from the same. It was contended that this statute was in violation of Sec. 2, Art. IV of the Constitution of the United States, but the court upheld the statute, upon the ground the fish in the waters of Virginia belonged to the people of that State. At page 400, the court says:

> Under colonial charters the right of fishery was vested in each colony for the benefit of its own people and was under its own control. This right has never been ceded. The federal government has control of navigable waters for the purpose of commerce and defence, but the fisheries remain the common property of the people of the State.

To the same effect is the case of Haney v. Compton, 36 N. J. Law, 507-521.

Smith v. Maryland, 18 How., 71, is a case involving the authority of Maryland to regulate the taking of oysters in Chesapeake Bay. At page 74 the Court says:

> Whatever soil below low-water mark is the sub-

ject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the declaration of independence. * * * *

But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. * * * The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. * * * * * * *

The law now in question is of this character. Its avowed, and unquestionably its real object, is to prevent the destruction of oysters within the waters of the State, by the use of particular instruments in taking them. It does not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by

> all citizens of the United States; whether this public use may be restricted by the State to its own citizens, or a part of them, or by force of the Constitution of the United States must remain common to all citizens of the United States; whether the national government, by a treaty or act of congrees, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the State holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case, and upon which we give no opinion.

McCready v. Virginia, 94 U. S., 391, involved the validity of a statute of Virginia prohibiting any person other than a citizen of that State from taking or catching oysters or shell-fish, or planting oysters, in waters in that State. The court fully met and answered the queries suggested in Smith v. Maryland, *supra*, and at page 394 says:

> The precise question to be determined in this case is, whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege.
>
> The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. * * * * In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State

> represents its people, and the ownership is that of the people in their united sovereignty. Martin v. Waddell, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

After referring to the contention of the plaintiff in error, that the Virginia statute was in violation of that clause of the Federal Constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states", the court proceeds:

> We think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once

vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not "belong of right to the citizens of all free governments", but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but by citizenship and domicile united: that is to say, by virtue of a citizenship confined to that particular locality.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it cannot do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclu-

sion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.

From these adjudicated cases, as well as upon principle, it seems clear that the State owns the game within its borders, and for this purpose, represents its people in their united sovereignty. The game, like fish, like the beds of tide-waters, and like any other common property of the people of the State, is under the exclusive control of the State, and its killing may be therefore regulated, limited or altogether prohibited by the legislature of the State, as the public good may require.

Game is migratory, and, unlike oysters and other shell-fish, does not have any fixed *situs*. It is in no sense attached to the soil over which it roams; being upon the land of one proprietor to-day, upon that of another to-morrow, and upon public land the next, its ownership is not dependent upon the ownership of the soil.

Political dominion is not an incident to ownership of the soil; and the lands held by the general government in the several States are held by it as an ordinary proprietor, except in the instances where it is expressly given exclusive jurisdiction by the constitution.

In Fort Leavenworth R. R. Co. v. Lowe, 114 U.S., 525, in speaking of the Fort Leavenworth military reservation within the State of Kansas, but over which

jurisdiction had not been retained by the United States upon the admission of the State, the court, at page 527, says:

> The United States, therefore, retained, after the admission of the State, only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the general government, that part of the tract, which was actually used for a fort or military post, was beyond such control of the State, by taxation or otherwise, as as would defeat its use for those purposes. So far as the land constituting the Reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The State could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties.

From this, it follows that the ownership by the United States of the soil over which game roams in Wyoming, is, in itself, no impediment and no obstacle to the regulation by the State of the taking and killing of such game.

While Wyoming remained a territory, "the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it;" but upon the admission of the State "into the Union on an equal footing with the original States in all respects whatever," she became possessed of this political dominion and sovereignty, subject only to the Constitution of the

United States, and thereby became the owner of the game within her borders, and became entitled to adopt and execute such laws as might be deemed necessary for its protection and preservation. There was no exception or reservation in the act of admission respecting the Indians, or their treaty stipulations, or the ownership of game.

If it be suggested that the treaty with the Indians, made before the admission of Wyoming, was in the nature of a contract, and conferred upon the Indians rights which could not be abrogated by the act of admission, there is a sufficient answer to the suggestion, viz.: The game had not been reduced to possession by the Indians, was not absolutely granted to them, and was not capable of sale, transfer or other disposition. There was no vested right. All that was granted by the treaty was a mere privilege to hunt, and that was not exclusive.

Respecting the privileges granted to the Chinese by treaty, and subsequently withdrawn by Congress, the court, in The Chinese Exclusion Case, 130 U. S., 581, at page 600, says:

> Here the objection made is, that the act of 1888 impairs a right vested under the treaty of 1880, as a law of the United States, and the statutes of 1882 and 1884 passed in execution of it. It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is

not on that account invalid or to be restricted in its enforcement.

And at page 609, the court proceeds:

> The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. Thus in *The Head Money Cases*, the court speaks of certain rights being in some instances conferred upon the citizens or subjects of one nation residing in the territorial limits of the other, which are "capable of enforcement as between private parties in the courts of the country". "An illustration of this character", it adds, "is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens" * * * * Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes.

This was expressly affirmed in Fong Yue Ting v. United States, 149 U. S., 698-722.

3. *Independent of the question of ownership, the preservation of game and fish is within the proper domain of the police power of the States and the hunting privilege granted to the Indians by the treaty is subject to the exercise of this power.*

In Lawton v. Steele, 152 U. S., 133, a case involving the authority of the State of New York to enforce legislation adopted to secure the protection of game and fish, the court, at page 136, in discussing the police power says:

> Beyond this, however, the State may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. * * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive on individuals.

And again, at page 138, the court says:

> The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the

time and manner in which fish may be caught, have been repeatedly upheld by the courts.

And on the same page, the court quotes with approval the following from State v. Roberts, 59 N. H., 256:

> At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and, therefore, it is within the authority of the legislature to impose restrictions and limitations upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question.

And again on page 139, the court says:

> The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

Statutes for the protection and preservation of game and fish are generally upheld by the State courts as a proper exercise of the police power. The following are instances:

Gentile v. State, 29 Ind., 409-415.
State v. Lewis, 134 Ind., 250.
Paul v. Hazelton, 37 N. J. Law, 106.
Haney v. Compton, 36 N. J. Law, 507-521.
State v. Snover, 42 N. J. Law, 341.
Phelps v. Racey, 60 N. Y., 10.
Burnham v. Webster, 5 Mass., 266.
State v. Norton, 45 Vt., 258.
State v. Medbury, 3 R. I., 138.
Chambers v. Church, 14 R. I., 398.
State v. Randolph, 1 Mo. App., 15.
State v Judy, 7 Mo. App., 524.
State v. Farrell, 23 Mo. App., 176.
Magner v. People, 97 Ill., 320.
Adams Ex. Co. v. People, 133 Ill., 649.
Ex Parte Maier, 103 Cal., 476.
Tiedeman on Police Power, p. 440.

In the case of Gentile v. State, *supra*, at page 415, the court says:

> It is also insisted that the act in question is in violation of the vested rights of many of the citizens of the State, and is, for that reason, unconstitutional.
>
> The proposition is, that the legislature "has no power to pass a law denying or abridging the right of the people of the State to fish in their own waters, and upon their own soil, at pleasure"; that land owners derive titles from the *United States*, and their grants include all unnavigable

streams of water passing over their lands, with the exclusive right to fish therein, within their own boundaries: and that where the land bounds on such a stream, the stream is the common property of the adjoining proprietors, who have the exclusive right of fishing. And it is claimed that this right to fish may be exercised at all times, at the will of the land owner, and is not subject to be controlled, restrained or abridged by the legislature.

After reviewing the authorities cited on behalf of the appellant, the court, at page 417, proceeds:

The proposition of the appellant's counsel is erroneous, in confounding the exclusive right of the owner of the stream to fish therein, with the right of property in the fish before they are taken. But fish are *ferae naturae*, and as far as any right of property in them can exist, it is in the public, or is common to all. No individual property in them exists until they are taken and reduced to actual possession. 2 Black. Com. 302. They are natives of the water: it is there they generate and live and grow, and no individual property in them can attach whilst they remain there free. But, as they are valuable for food, the public has an interest in their protection and growth.

In the States bounding on the seaboard, where valuable fish pass, in great numbers, up the rivers and streams that flow into the sea, fisheries constitute a valuable interest both to the public and to individuals, and in many, if not all, of those

States, their production and growth are stimulated and protected by penal statutory prohibitions against taking them during certain portions of the year, and especially during the spawning period.

An examination of those laws will show that many of them are more stringent than our statute, but we are not aware that it has ever been claimed that they are in conflict with the constitutions of those States, as being in violation of vested rights.

The same principle precisely is involved in the numerous game laws of this and other States, the constitutionality of which, we believe, has never been seriously controverted.

If the exclusive right to fish in the unnavigable waters on one's own land is subject to regulation under the police power, then it necessarily follows that a right to hunt, not exclusive but in common with others, on public land, is equally subject to regulation. The object of this regulation is to protect the game from the destruction consequent upon its unrestrained and indiscriminate slaughter. The preservation and protection of the game is equally beneficial to all who are permitted to hunt, and its diminution and destruction is equally injurious to all. The destruction of the game works a destruction of the right to hunt. The Wyoming statute forbids the killing of game during the breeding season, and forbids its wanton destruction at any time. In proportion as this protects

and preserves the game it is beneficial to the Indians as well as to others who enjoy the hunting privilege. A license to hunt, of the character granted in the treaty, like any property right or privilege, is subject to reasonable regulation; not that kind of regulation which tends toward deprivation of the right, but that kind of regulation which tends toward preservation of the game, and the attendant preservation of the benefits incident to the hunting privilege.

The claim of the appellee, as stated in the written argument of his counsel in the Circuit Court, was as follows:

> The word "hunt" has a well defined meaning. In the Standard Dictionary the word "hunting" is defined: "The art or practice of pursuing wild game; the chase, whether carried on as a means of livelihood or of sport". We know that men of every race throughout all the ages of the past have been accustomed to hunt game, both for the purpose of obtaining food and for sport and pleasure. There is no limitation in the treaty provision as to the season of the year or the purpose for which the game may be hunted. It carries with it its own limitations, and we submit that inasmuch as this is the fact, that it is wholly beyond the power of the legislature of this State, however desirable it may be, to add to these limitations.

This claim is not well grounded. The treaty does not say that the hunting privilege therein granted is

unlimited and unlimitable as to either time or purpose. In the absence of such an express provision in the treaty it should not be so construed. The provision was not inserted in the treaty to gratify some vain, idle or captious demand. It has been the policy of government and legislation for centuries to adopt measures reasonably calculated to protect game from destruction, and it would be doing violence to those negotiating the treaty to believe that they intended in this instance to reverse the established policy and to invite and encourage the useless and wanton destruction of game by conferring upon two tribes of Indians the unlimited and unlimitable right to pursue the chase as a matter of pastime, sport and pldasure. If property rights of the highest and most sacred type are subject to police regulations, why should not this mere hunting privilege be equally so?

On the Shoshone reservation in Wyoming, containing 2,342,400 acres, there are 916 Shoshone Indians; and on the Fort Hall Indian Reservation in Idaho, containing 864,270 acres, there are 514 Bannock Indians. (Eleventh Census, 1890, Indians, pages 514 & 629.) If the contention of counsel for the appellee, as made in the Circuit Court, be correct, these 1,430 Indians will soon be able to terminate their right to hunt by extinguishing all the game upon which it can operate.

So well established is the police power to make regulations for the protection of game and fish, that grants

of mill-rights are impliedly subject to the exercise of this power, in making provisions for the passage of fish in streams in which dams have been erected.

Stoughton v. Baker, 4 Mass., 521, is a case in which it appears that the defendants' dam was an ancient one; that defendants deraigned title from the original proprietor, who acquired his right in 1633 by a grant from the town within whose limits the mill-site was situated. In 1805, a committee, acting under legislative authority, had suitable fish-ways constructed about the dam of defendants, and the defendants resisted a suit to recover their proportion of the expenses thereof, claiming that the original grant was a bar to the claim. At page 528, Chief-Justice Parsons, delivering the opinion of the court, says:

> The ancient grants by towns are very loosely expressed, and when a fee was intended, words of inheritance are seldom used. When a long possession by the grantee, his heirs or assigns, has followed the original grant has uniformly been considered as a grant of a fee. In this case, we are therefore of opinion that *Stoughton* took a fee in the *mill privilege*, as it is usually called in this State. And having a privilege to build a mill, he necessarily had a right to erect a dam, to raise water sufficient to drive his mill.
>
> But the right to build a dam for the use of a mill was under several implied limitations. One was to protect private rights, by compelling him to make compensation to the owners of land above,

for, and damages occasioned by, overflowing their lands: another was to protect the rights of the public to the fishery: so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights.

If the government should, in its grant of a *mill privilege*, expressly or by necessary implication, waive this limitation, it would be bound. But it would be an unreasonable construction of the grant by *Dorchester*, to admit that by it all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled.

In Holyoke v. Lyman, 15 Wal., 500, a cause involving a similar question, the court, at page 520, says:

Fishways have never been constructed by the respondents in their dam, and they contend that they are not obliged to make any such provision for the passage of the fish, as their charter does not create any such obligation: but the answer which the complainants make to that suggestion is decisive, that the charter does not contain any provision exempting them from that implied obliga-

tion, which arises in every such case by the common law of that State, unless the charter contains some provision which expressly negatives that implication. Even suppose that is so, still they contend that the fourth section of the charter of their grantors should be construed as negativing any such implied condition, but the court is entirely of a different opinion, as that section makes no provision for any compensation to the owners of the fish rights below the dam, and the record shows that such fish rights, as well as those above the dam, are injured by the obstruction to the free passage of the fish in their accustomed seasons to the headwaters of the river. Authority to construct and maintain a dam without a fishway, it is conceded, is not granted in terms in the charter, and it may be added that the charter does not contain any words to warrant any such implication.

The case of Fertilizing Co. v. Hyde Park, 97 U. S., 659, well illustrates how rights and privileges, obtained by legislative authority, are impliedly subject to what is known as the *police power*. March 5, 1867, a charter of the village of Hyde Park was enacted by the legislature of Illinois, in which ample provision was made for the defining, regulating and abating of nuisances, including all establishments and places where any nauseous, offensive or unwholesome business was carried on. This act, however, provided that nothing therein contained should be construed to authorize the village to interfere with parties engaged in manufacturing any

animal matter into a fertilizer or other chemical product. On March 8, 1867, an act was passed by the legislature, providing for the incorporation of the Fertilizing Company, declaring that it should have continued succession and existence for fifty years; authorizing it to manufacture animal matter into fertilizers and other chemical products and designating the place within the village where its business should be operated and carried on. Subsequently the village, under general authority to regulate nuisances, passed an ordinance declaring the business of the Fertilizing Company a nuisance and imposing penalties for its continuance. In the meantime the village had grown and its population extended to, and around, the fertilizing establishment, so that the prosecution of the business had become an unendurable nuisance. It was contended on behalf of the Fertilizing Company that its charter was a contract, and protected it from the enforcement against it of the ordinance in question. The court, at page 667, says:

> Three days before the charter of the plaintiff in error became a law, the legislature declared that the power of the village as to nuisances should not extend to those engagee in the business to which the charter relates. The subject must have been fully present to the legislative mind when the company's charter was passed. It it were intended that the exemption should be inviolable, why was it not put in the company's charter as well as in that of the village? * * * *

> That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions. The adjudged cases showing its exercise where corporate franchises were involved are numerous.

And again, at page 668, the court says:

> In such cases, prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justfication that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it.

In Barbier v. Connolly, 113 U. S., 27, involving the regulation of laundries and wash-houses under an ordinance of San Francisco, it was contended that the ordinance was violative of the Fourteenth Amendment

to the Constitution of the United States. Answering this contention, the court, at page 31, says:

> But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.

In Ballock v. State, 73 Md., 1, in which an Austrian had been indicted and convicted for selling Austrian bonds in such manner as to violate the lottery laws of Maryland, the court, at page 8, says:

> It is true the Austrian government bonds are vendible, and ought to be treated as other articles of commerce, as a rule; but, when those bonds are coupled with conditions and stipulations which change their character from simple government bonds for the payment of a certain sum of money to a species of lottery ticket which falls under the condemnation of our statutes, it must be classed as its conditions characterize it, and then it is not vendible under our law; and it does not violate constitutional provision or treaty stipulation to so hold. All the decisions of the supreme courts make a saving in favor of police regulations, as within constitutional authority. Such bonds as this should be no more protected in their sale than diseased meat or diseased cattle, which no one

> would contend could not and should not be restricted and punished. They are property, of course, and their possession would be protected, and if disturbed the law would redress. So it would be with Louisiana lottery tickets, which are confessedly not salable; and such bonds should be no more protected in their sale than the lottery tickets pure and simple.
>
> The case has been argued as if this defendant was charged to be and is an Austrian subject, and entitled by treaty stipulation to sell and dispose of his property. He is not so charged to be, and, if he was, he would have to be treated exactly as if he was a citizen of the United States, and the State of Maryland. The criminal laws operate alike and equally upon residents and non-residents. As an Austrian, he could not sell lottery tickets in Louisiana lottery, although he might own them, with any more immunity and right than one of our own citizens. Constitutional provisions and treaty stipulations never could have been intended to prevent a State from forbidding that which was deemed injurious to its people.

This case, of the Maryland court, was cited with approval in Horner v. United States, 147 U. S., 449, and a part of its language is quoted at page 461.

If the police power of a State is sufficient to enable it to protect the private property of its people, it is equally potential to enable it to protect their public property—that in which they all have a common interest.

It certainly will not be anywhere asserted that the United States has authority to make provision for the protection of game within a State. No such authority has been ceded to the general government; it was retained by the States. Game laws are not national in character and do not admit of general rules. The authority to enact them can be most advantageously exercised by the States. Since the power must exist somewhere to regulate the taking and killing of game, and since it does not rest in the Federal Government, it must be held by the States. A game law, operative upon the people of the State, but not operative upon Indians when within the State but off their reservation, would not address itself to the consideration of a well intended legislator. Such a law would not subserve the purpose for which such laws are enacted. Fourteen hundred and thirty Indians, enjoying and exercising an unlimited and unlimitable right to hunt, would soon be able to exterminate the game now remaining in the State and thereby destroy a food supply in which all the people of the State have a common interest. Instead of using their own rights so as not to do injury to the rights of others they would be using them not only to the injury but to the entire annihilation of the rights of others.

It having been the established policy in England and other civilized countries, and in the United States from the establishment of the colonies, to make provision

for the protection of game, a construction should not be given to the treaty in question which involves a surrender of this policy. In the absence of an express provision to the contrary, a construction should be given to the treaty by which the hunting privilege of the Indians will be at least subject to reasonable regulation and control for the equal benefit of the Indians and others possessing the hunting privilege.

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4. The Wyoming law regulating the taking and killing of game, enacted under the police power of the State, is not a regulation of commerce with the Indian tribes.

In Smith v. Maryland, 18 How., 71, the court, at page 74, says:

> It was argued that it is repugnant to that clause of the Constitution which confers on Congress power to regulate commerce, because it authorizes the seizure, detention and forfeiture of a vessel enrolled and licensed for the coasting trade, under the laws of the United States, while engaged in that trade.
>
> But such enrolment and license confer no immunity from the operation of valid laws of a State. If a vessel of the United States, engaged in commerce between two States, be interrupted therein by a law of a State, the question arises whether

> the State had power to make the law by force of which the voyage was interrupted. This question must be decided, in each case, upon its own facts. If it be found, as in Gibbon v. Ogden, 9 Wheat, 1, that the State had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful, and the proceeding under the law invalid. But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws.

At page 76 the court proceeds:

> Our opinion is that so much of this law as appears by the record to have been applied to this case by the court below, is not repugnant to the clause in the Constitution of the United States which confers on Congress power to regulate commerce.

In the case of McCready v. Virginia, 94 U. S., 391, involving the authority of Virginia to confine to its own citizens the right to take oysters in the waters of that State, it was contended by the plaintiff in error (page 393) that:

> The legislation is in conflict with the third clause of the eighth section of the first article of the Federal Constitution, which confers on Congress the power "to regulate commerce with foreign nations and among the several States".

In answering this contention the court, at page 396, says:

> Neither do we think this case is at all affected by the clause of the Constitution which confers power on Congress to regulate commerce. Art. 1, Sect. 8. There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade. Virginia, owning land under water adapted to the propagation and improvement of oysters, has seen fit to grant the exclusive use of it for that purpose to the citizens of the State. In this way the people of Virginia may be enabled to produce what the people of the other States cannot; but that is because they own property which the others do not. Their productions do not spring from commerce, but commerce to some extent from them.

In Haney v. Compton, 36 N. J. Law, 507, in passing upon a statute of New Jersey similar to that of Virginia above named, the court, at page 522, says:

> The plaintiffs, however, insist that admitting the true construction of the act is as I have stated, it is unconstitutional and void, because it is a regulation of commerce. It was doubtless with a view of raising this question, that it was averred in the pleas that the vessel at the time of her seizure had a coasting license from the government of the United States. But it cannot with any propriety be said that a statute which simply prohibits non-residents on board a vessel from subverting the soil of the State and carrying away her property, or that of her *grantees*, leaving such vessel free to

> pass and repass, and go whithersoever those in charge of her desire, is a regulation of commerce with foreign nations, or among the States. It is a law for the protection of property—at most an internal police regulation entirely within the competency of the State to adopt, and it is not perceived that it can by possibility interfere with commerce in the sense in which that word is used in the Federal Constitution.

The same question has been repeatedly before the State courts and a like result declared.

> Ex parte Maier, 103 Cal., 476.
> Magner v. People, 97 Ill., 320.
> Phelps v. Racey, 60 N. Y., 10.
> State v. Judy, 7 Mo. App., 524.

In State v. Saunders, 19 Kas., 127, the court, at page 130, says:

> For instance, a law which prohibits the catching and killing of prairie chickens may be valid, although it may indirectly prevent the transportation of such chickens from the State to any other State; but a law which allows prairie chickens to be caught and killed, and thereby to become the subject of traffic and commerce, and at the same time *directly* prohibits their transportation from the State to any other State, is unconstitutional and void.

The statute condemned in this case permitted the killing of prairie chickens at a time and in a manner named, but expressly prohibited their transportation

out of the State, without regard to whether they had been lawfully killed and reduced to possession before the attempted shipment.

Game in its wild state is not a subject of individual ownership and is not a subject of commerce. It cannot become the subject of sale or transportation until after it has been killed and reduced to possession and individual ownership.

The offense with which Race Horse was charged was not that of selling or transporting game which had been lawfully killed, and had thereby become the subject of traffic and commerce; but his act was that of killing game in its wild state during a prohibited period and before it had become a subject of trade and congressional regulation.

Differing from the Kansas case of State v. Saunders, *supra*, is the case of American Express Co. v. People, 133 Ill., 649, in which the court, at page 655, says:

> It is, however, argued, that where quail have been killed, the dead animals become property, and the taker the absolute owner of such property, and an act to prevent a sale or transportation for sale within the State would be an interference with private right, amounting to a destruction of the right of property without due process of law. The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. In the

Magner case, supra, it was held, as has been seen, that no one has a property in animals and fowls denominated game,—the ownership was in the people of the State. This being so, it necessarily followed that the legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the legislature might confer. The legislature has never conferred an absolute property in quail upon the person who might kill the same. The killing of quail during the months of October and November was permitted, not for sale—not to go upon the market as an article of commerce—but for the mere use of the person who killed the birds. The person killing quail under this statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser should take them from him, he might maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell or the right to ship for the purpose of sale, and when such person undertakes to ship for sale, he is undertaking to assert a right not conferred by law. The act, therefore, does not destroy a right of property, because no such right exists.

As indicating the extent to which the killing and even transportation of game in England is subject to the police power, we cite the case of Whitehead v. Smithers, 2 C. P. Div., 553, in which the court held,

that one who had imported dead plover from Holland and had sold them in the British market, came within the prohibition of the statute for the protection of British game. Lord Coleridge, Ch. J., says:

> It is said it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill birds. But it may well be that the true and only mode of protecting British wild-fowl from indiscriminate slaughter, as well as protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild-fowl from being improperly killed, and sold under pretense of their being imported from abroad.

5. *The United States has recognized and acquiesced in that construction of the treaty which makes the hunting privilege of the Indians subject to regulation and control under the police power.*

The Yellowstone National Park was, the greater portion of it, situated within the Territory of Wyoming; but by the act admitting Wyoming into the Union, (26 U. S. Stats., 222) the Park was excepted out of the State and the Federal Government retained exclusive jurisdiction over the same.

By the Act of March 1, 1872, (17 U. S. Stats., 32,)

the Park was set apart as a pleasure-ground for the benefit and enjoyment of the people; and in the second section of the act, the Secretary of the Interior was given authority to "provide against the wanton destruction of the fish and game found within the Park, and against their capture or destruction for purposes of merchandise or profit."

By the Act of May 7, 1894, (28 U. S. Stats., 73) complete provision was made in section four for the protection and preservation of the game and fish in the Park. Neither of these acts make any reference to Indians or to Indian privileges under the treaty, and both acts were passed without obtaining the assent of the Indians and without making, or providing for, any compensation to the Indians for any supposed infringement of their rights under the treaty.

The place where Race Horse killed the elk is but a short distance south of the Park; and if the place of his offense was a hunting district, within the meaning of the treaty, then the country embraced within the Park was necessarily so, because they are contiguous; and, in addition, the Park is not, and never has been, settled or occupied by white people. While Congress unquestionably had full power to repeal the treaty as to the Yellowstone Park, its authority in that respect was no greater than with respect to the country embraced within the State of Wyoming by the admission of the State.

Legislation for the protection of game and fish is not of recent origin in Wyoming. The territorial legislatures enacted laws upon the subject, which, by their terms, were applicable to all persons. The various territorial enactments are as follows:

Act of Dec. 1, 1869, Laws of 1869, page 289.
Act of Dec. 16, 1871, Laws of 1871, page 113.
Compiled Laws of 1876, page 362.
Act of Dec. 6, 1877, Laws of 1877, page 37.
Act of March 9, 1882, Laws of 1882, page 127.
Act of March 12, 1886, Laws of 1886, page 413.
Act of March 9, 1888, Laws of 1888, page 159.
Act of March 14, 1890, Laws of 1890, page 117.

The act of Congress to provide a temporary government for Wyoming provided that copies of the territorial laws should be transmitted to the President and to each branch of Congress. (15 U. S. Stats., 179, Sec. 3.) Full authority existed in Congress to annul any of these, but no such action was taken with respect to these statutes, although the power was exercised in other instances. While this would not, of itself, make valid a statute which was clearly beyond the authority of the territorial legislature, it is nevertheless, a matter to be considered in determining their validity, where questions of construction are involved. The attention of the President and Congress being called to them, and none of them being annulled, the presumption is that they were deemed within the authority of the territorial assembly.

In Hornbuckle v. Toombs, 18 Wal., 648, the court in discussing the validity of certain Territorial legislation, at page 655 says:

> Whenever Congress has proceeded to organize a government for any of the Territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature.

In Clayton v. Utah, 132 U. S., 632, the Court in considering the validity of Territorial legislation, at p. 642, says:

> It is true that in a case of doubtful construction the long acquiescence of congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the legislature to enact it.

6. *Indians within the limits of a State and off of their reservation are subject to the jurisdiction of the State and amenable to its laws.*

In U. S. vs. Yellow Sun, 1 Dillon, 272, a case involving jurisdiction of an offense committed by an Indian in the State of Nebraska, and not on an Indian reservation, Judge Dillon at p. 273 says:

> The only allegations in the indictment made with a view to show the jurisdiction of the court are the following: "That the defendants are Indians belonging to the Pawnee tribe, which tribe were and are in charge of an United States Indian agent duly appointed by the United States, and were and are living upon an Indian reservation known as the 'Pawnee reservation,' within the State of Nebraska; and that said defendants crossed the boundary line of said Indian reservation, and entered into the county of Polk, in the State of Nebraska aforesaid, and then and there unlawfully", etc., did kill and murder, by shooting, as particularly described in the indictment, one Edward McMurty, a white inhabitant of said State. Thus, it appears by the express averments of the indictment, that the place where the offense was committed was within the body of the County of Polk, in the State of Nebraska, and not within the limits of the Indian reservation. The proof corresponded with the allegations. The offense is alleged and was shown to have been committed on the 8th day of May, 1869, which was after Nebraska had been admitted into the Union, and her organization as a State fully per-

fected and in operation. The question is, whether the offense thus committed is one of which the courts of the United States have cognizance, or whether it is alone cognizable, if at all, by the courts of the State of Nebraska.

Within the territorial limits of the State just named is a body of people known as the Pawnee tribe of Indians, to which the defendants belong. This region has long been their home; but their occupancy is now restricted to a "reservation" of limited extent. Here they reside in a body, maintaining their tribal organization, under the superintendence of agents appointed by the government of the United States. They are already in the midst of a white population, but do not enjoy any of the political, nor many of the civil rights, of the latter. They do not vote, are not taxed, and under the decisions of the Supreme Court of the United States their property is not taxable by the State authorities. The ordinary State laws relating to schools, marriage, divorce, administration of estates, and the like, are not extended to, observed or enforced among, them. As respects all their internal concerns, they are governed by the laws and customs of the tribe.

And again, at p. 275, the opinion proceeds:

Nebraska was organized as a territory, by the act of May 30, 1854, and by that act (secs. 1 and 37) the rights of Indians therein are preserved unimpaired, and the authority of the United States to make regulations respecting them, their property, and other rights, by treaty, law or otherwise,

retained. The Pawnee tribe then, as now, resided within the limits of the territory thus created.

On the 24th day of September, 1857, the Pawnees ceded by treaty, of that date, their lands in the territory of Nebraska to the United States, reserving, however, out of the cession, a "tract of country thirty miles long from east to west, and fifteen miles wide from north to south". (11 Statutes at Large, 729.) This is the reservation described in the indictment. This treaty provides that the United States agents may reside on the reservation; that the government may build forts, etc., therein; that the whites may open roads through it, but shall not reside therein; that the Indians shall not alienate the lands except to the United States; that all offenders against the laws of the United States shall be delivered up, etc.; but it contains no stipulation as to the jurisdiction over it, or over the Indians residing therein, when the territory shall be admitted as a state.

On the 19th day of April, 1864, Congress passed an act to enable the people of Nebraska to form a State constitution. In 1866, a State constitution was formed, and in 1867 Congress passed an act for the admission of Nebraska, under its constitution, into the Union, "upon an equal footing with the original States, in all respects whatever." There is no exception in the State constitution, or in either of these acts of Congress of the Pawnee Reservation, or the Pawnee Indians, from the territorial or civil jurisdiction of the State. So that we have before us the case of Indians maintaining the tribal organization, which is

> recognized in the treaty by the general government, but living upon a reservation which is now within the limits of a State, and respecting which, or the Indians occupying it, there are no special provisions granting or retaining jurisdiction in favor of the United States, or withdrawing the Indians from the jurisdiction of the State.
>
> It will be observed that the present indictment is not for an offense committed by Indians against an inhabitant of the State *upon the reservation*, and hence we have no occasion to inquire whether for such an offense the courts of the United States or those of the State of Nebraska have jurisdiction; nor whether it would be competent for Congress in such a case (in the absence of any cession of jurisdiction by the State) to invest the national courts with cognizance thereof.

And again, in considering the effect of the Indian Intercourse Act, on page 279, the opinion proceeds:

> At the time this statute was enacted it applied to the locality where the offense in question was committed; but it ceased to be operative within the limits of Nebraska, at the moment when the latter was admitted into the Union as a State upon an equal footing with the original States.

And later on the same page the opinion proceeds.

> And it seems impossible to hold that the court has jurisdiction in the case without necessarily implying that the courts of the State have not; and if they have not, then we decide that the State of Nebraska has not the power to make her ordinary criminal statutes co-extensive with the State limits,

> and enforce them against all persons living or found therein. Such a power we are not prepared to deny to the State in the absence of some controlling treaty stipulation or valid act of Congress.

And after discussing to some extent the authority of Congress to provide for the punishment of offenses committed by or against Indians *upon reservations in State limits*, Judge Dillon further proceeds:

> But if it be conceded that under the power of peace and war, to make treaties, and to regulate commerce with the Indian tribes, (Worcester v. Georgia, 6 Pet., 515, 559), Congress could, in the absence of reserved right to do so, withdraw Indians living within the limits of a State, entirely from State jurisdiction and the reach of its criminal laws and process, for offenses against its citizens committed off a reservation, it would seem most improbable that such a power would ever be exercised. We have seen that in point of fact Congress has not undertaken to exercise it, and, therefore, this court, which can take cognizance only of offenses created by some act of Congress, has no jurisdiction of the crime charged in the indictment. The defendants must be discharged.

In the case *In re* Wolf, 27 Fed. Rep., 606, involving the jurisdiction over an offense committed by one Indian upon another, when off their reservation, the court at page 609 says:

> Then, the next question is, does the Supreme Court of the District of Columbia have jurisdiction

over the persons of the petitioners? The petitioners, Wolf and Ross, are shown to be Indians by blood, members of the Cherokee Nation or tribe of Indians, because of their having the blood of the race. They reside in and are a part of the Cherokee Nation or tribe of Indians. This crime is one alleged to have been committed against the Cherokee Nation of Indians, which in law is an Indian tribe. This, then, is a case of a crime committed by one Indian against another Indian. It is claimed, this being true, the case is not within the jurisdiction of the Supreme Court of the District of Columbia; that said court has no jurisdiction over the persons of defendants. Section 2145, Rev. St., provides that "except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country". Section 2146, among other things, provides that the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian.

The prohibition by this section of the law of the jurisdiction of a court of the United States over a crime committed by one Indian upon another is one which is personal to the Indian, only when the crime is committed in a certain section of the country, to-wit, the Indian country. It is a prohibition which is clearly local. When a crime is committed by an Indian, although such crime may

be against the person or property of another Indian, if committed outside the Indian country, the Indian is like any other person as far as the criminal laws of the nation or the states are concerned. In a case where he has committed a crime against such laws, he is by them a forensic citizen, subject to the jurisdiction of the courts which administer them. Our laws govern all. They bind and protect all. They bind and protect alike all persons —natives, foreigners, and those whose *status* to the United States may be one of alienage. They are all alike subject to the criminal laws of the country, and when they commit a crime against the laws of the nation, at a place over which the courts of the nation have jurisdiction, they are subject to trial in such courts. Mr. Kent, in 1 Kent, Comm. 36, says: "Strangers are equally bound with natives to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law."

To the above rule there are some exceptions: *First*, the case of a foreign sovereign and his attendants: *Second*, foreign embassadors, and their attendants. By the law of nations they are not subject to the laws of the country they may visit, or in which they have a temporary domicile. Sections 124-134 Bish. Crim. Law.

The other exception is one recognized as existing under the laws of the United States. It is that of an Indian committing a crime upon another Indian, *in the Indian country*. When an Indian is outside of that country he is entitled to the full

measure of protection afforded by the laws of the nation, and if he commits a crime outside of the Indian country, whether upon one of his own race or another, he is amenable to the law of the place where the crime is committed. This proposition, to my mind, is established when stated.

The Act of Congress of March 3, 1885, (23 U. S. Stats. 385, Sec. 9) providing for the punishment of Indians for offenses committed by them, establishes two classes of cases: one, offenses committed by an Indian in a territory, whether on or off an Indian reservation; the other, offenses committed by an Indian within a State *and* within an Indian reservation. Jurisdiction over the first class is given to the courts of the territories, and jurisdiction over the second class is given to the courts of the United States.

It will be noticed that Congress in the exercise of its plenary jurisdiction over the territories makes no distinction whether the offense be committed on or off a reservation, but in the exercise of its limited jurisdiction within a State, it carefully avoids any assertion of jurisdiction except when the offense is committed on a reservation.

As illustrating that Indians are amenable to State laws when off their reservation, see also:

McCracken v. Todd, 1 Kan., 148-159.
Hunt v. State, 4 Kan., 60.
Rubideaux v. Vallie, 12 Kan., 28.
Lowry v. Weaver, 4 McLean, 82.

7. *New States, when admitted into the Union, are so admitted upon an equal footing with the original States and become possessed of all the authority, powers and attributes of sovereignty possessed by the original States. Upon their admission, all legislation by Congress enacted solely through the exercise of the power of Congress to control the Territories, is repealed and abrogated as to such new States.*

In Pollard's Lessee v. Hagan, 3 Howard, 212, a case involving the question as to whether the United States or the new State of Alabama owned the shores of navigable waters and the soils under them, within the new State, the court, at page 223, says:

> When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional ca-

> pacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

In concluding the opinion, at page 230, the court says:

> By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.

In Permoli v. First Municipality, 3 Howard, 588, a case involving the question as to whether the Ordinance of 1787, theretofore extended over the Orleans territory, was in force in Louisiana after the admission of the new State into the Union, the court, at page 610, says:

> But as regards the State of Louisiana, it had no further force, after the adoption of the State Constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787.

> so far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State Constitution, nor is any of them in force, unless they were adopted by the Constitution of Louisiana, as laws of the State.

In Withers v. Buckley, 20 Howard, 84, in determining whether a law of Mississippi for improving the navigation of a river in that State tributary to the Mississippi river was in conflict with the act of Congress providing for the admission of that State into the Union, and guaranteeing the free navigation of the Mississippi river, the court, at page 92, says:

> In considering this act of Congress of March 1st, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee v. Hagan, 3 How., p. 223. The act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have

> been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, or might be productive of a change in the value of private property.

In Escanaba Company v. Chicago, 107 U. S., 678., in discussing the effect of the Ordinance of 1787 within the State of Illinois, after the admission of that State into the Union, the court, at page 688, says:

> The ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect, and although it appears to have been treated afterwards as in force in the Territory, except as modified by Congress, and by the act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the act of February 3, 1809, c. 13, creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those Territories; and although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a constitution and State government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in

> a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State in the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is "on an equal footing with the original States *in all respects whatever*." 3 Stat., 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new.

In United States v. Ward (1 Woolw., 17) in discussing the effect of the admission into the Union of the State of Kansas, Mr. Justice Miller, at page 21, says:

> The first clause of this act provides, that the State shall be admitted into the Union, "on an equal footing with the original States, in all respects whatever". Congress does not possess the power to withdraw from any one of the original States, without its consent, the authority to try and punish a man for murder, even in the smallest portion of its territory. It cannot be said of the new State of Kansas, that she stands upon "an equal footing with the original States in all respects whatever", if Congress can take from her courts, and vest in us, jurisdiction to try a man for murder committed within the State;—if Congress can, without her consent, exclude her from the right and the power to enforce the laws which

> she has made, for the protection of the lives, persons, and property of her citizens, on every portion of her soil. This power to enforce her criminal laws throughout her boundaries, which is unqualified and exclusive, and is to be possessed, enjoyed and exercised by the new State alone, and not concurrently with the Federal Government, is a necessary incident to her equality with the original States. It follows, then, unless the clause above cited in the act admitting Kansas into the Union is qualified by some other provision, it operates as a repeal of the act of 1830, so far as that State is concerned, and we are without jurisdiction.

In United States v. Stahl (1 Woolw. 192) in determining the jurisdiction of an offense committed in Fort Harker, after the admission into the Union of the State of Kansas, Mr. Justice Miller, at page 195, says:

> The government of the United States, when it admitted Kansas into the Union upon the same footing as the original States, retained the legal title to all the lands which it then owned in the State of Kansas. So far as general purposes of government were concerned, however, with certain reservations and exceptions, it parted with jurisdiction over it.
>
> The first exception reserved the lands of Indian tribes which had treaties exempting them from State jurisdiction; the second, the power to tax the lands of the United States and of the Indians. It was competent to the Federal Government, and it would have been appropriate at that time, to

have also excepted, out of this grant of jurisdiction, places for forts, arsenals, etc., if such had been the policy of Congress. But it was not done.

So far as the consent of Kansas to the exercise of this exclusive jurisdiction by Congress in concerned, that State stands on the same footing as the original thirteen.

The question then is, when Congress purchases the fee simple of a portion of territory included within one of the original States, for the purpose of erecting a fort thereon, what kind of consent is necessary to be obtained from the State Legislature in order to vest jurisdiction in the Federal Government?

It is not material now to inquire whether the United States could erect and occupy a fort without the consent of the legislature. The language is, that Congress shall exercise exclusive legislation over all places purchased with that consent. But whether the Constitution requires that consent as a condition precedent to the establishment and use of the place as a fort, may well be doubted. It does not seem probable that the framers of the the Constitution, who conferred on Congress full powers of making war, raising armies, and suppressing insurrections, and also declared that the Federal Government was established for the express purpose of providing for the common defence, would have left its power of erecting forts, so important to the execution of that purpose, subject to the volition of State legislatures. However this may be, it is clear that in order to withdraw

from a State a jurisdiction which it had possessed and exercised, and confer it on the general government, the consent of the former was made a pre-requisite. This is the material point aimed at by the provision of the Constitution.

All the important uses of a fort, arsenal or magazine could be secured without the exercise of exclusive legislation within their walls; and there was manifest propriety in requiring the assent of the State to the exercise of this important and delicate power, which of right belonged to the local authority, and which could be needed by or useful to the general government only in special cases.

This jurisdiction having been vested in the State of Kansas by the act admitting her into the Union, and never divested, it cannot now belong to the United States.

Since "equality of constitutional right and power is the condition of all the States of the Union, old and new", and since Wyoming "was admitted, and could be admitted, only on the same footing with" the original States and upon "her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States", we urge (Sub-division 2, p. 26 of this brief) that the State became thereupon the owner of the game and fish within her limits and was entitled to exercise exclusive dominion and control over the same in such manner as might best subserve the public good.

Apart from the question of ownership, the State on her admission became at once fully possessed of the same police authority and power to protect the game and fish within her borders as has always been possessed by the other States, and by the colonies before them. (Sub-division 3, p. 38 of this brief.)

The Act of Admission expressly says, that Wyoming "is hereby declared admitted into the Union on an equal footing with the original States *in all respects whatever*." No reservation of the game and fish, or of the right to control the same was made or suggested. Whatever rights of dominion and sovereignty belonged to statehood were conferred upon the new State of Wyoming as clearly and unmistakably as if each and every thereof was expressly mentioned in the Act. The language used was just as potential and just as far reaching for the purposes of the matter now in discussion as if Congress had expressly said: "and such State shall be authorized and empowered and hereby is authorized and empowered to exercise the same dominion and control over the game and fish within such State as was exercised by the original States of the Union." The language which was used means nothing more and can mean nothing less.

8. *A treaty and a law of Congress are upon the same footing. Neither has superiority over the other, and both are subordinate to the Constitution. Treaty provisions are repealed by subsequent inconsistent Congressional legislation. The repeal may be either by implication or it may be expressed. The Act of Congress admitting Wyoming into the Union upon an equal footing with the original States is inconsistent with the Indian treaty and therefore repeals it to the extent of such inconsistency.*

That a law of Congress inconsistent with a former treaty repeals the latter to the extent of such inconsistency is so well established that we simply refer to a few adjudicated cases.

Head Money cases, 112 U. S., 580-597.
Whitney v. Robertson, 124 U. S., 190-193.
Chinese Exclusion Acts, 130 U. S., 581-599-609.
Fong Yue Ting, 149 U. S., 698-720.

It is not necessary that there be a direct reference to the treaty provision in order to accomplish its repeal. If the treaty and the Congressional enactment be inconsistent the repeal necessarily results. The rules for determining whether there is inconsistency and a consequent repeal are the same as those which apply to different Acts of Congress, or to different Acts of State legislatures. Indian treaties in this respect stand upon the same footing as other treaties.

In the Cherokee Tobacco Case, 11 Wallace, 616, a

treaty with the Cherokee Indians provided that the Indians should have the right to sell any products of the farm and to ship the same to market without restraint or paying any tax thereon which was then or might thereafter be levied by the United States. A subsequent law of Congress provided that the Internal Revenue law imposing a tax on tobacco should be extended to that article produced anywhere within the exterior boundaries of the United States, whether in a collection district or not. The court held that the subsequent congressional act repealed the treaty, although there was no reference in the statute to Indians or their country.

U. S. vs. McBratney, 104 U. S., 621, involved the question whether the United States had jurisdiction of the crime of murder committed by a white man upon a white man within the Ute reservation, in the State of Colorado. The Ute treaty provided that the United States should have police jurisdiction over the reservation, and the subsequent Act admitting Colorado into the Union contained no exception of the Ute reservation or of jurisdiction over it.

The Court at p. 623 says:

> By the first section of the act of Congress of Feb. 28, 1861, c. 59, to provide a temporary government for the Territory of Colorado, all territory which, by treaty with any Indian tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any State or

Territory, was excepted out of the boundaries and constituted no part of the Territory of Colorado; and by the sixteenth section, "the Constitution and all laws of the United States which are not locally applicable shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States." 12 Stat. 172, 176. If this provision of the first section had remained in force after Colorado became a State, this indictment might doubtless have been maintained in the Circuit Court of the United States. United States v. Rogers, 4 How. 567; Bates v. Clark, 95 U. S. 204; United States v. Ward, 1 Woolw. 17, 21.

But the act of Congress of March 3, 1875, c. 139, for the admission of Colorado into the Union, authorized the inhabitants of the Territory "to form for themselves out of said Territory a State government, with the name of the State of Colorado; which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever," and the act contains no exception of the Ute Reservation, or of jurisdiction over it. 18 Stat., pt. 3, p. 474. The provision of Section one of the subsequent act of June 26, 1876, c. 147 (19 Stat. 61), that upon the admission of the State of Colorado into the Union "the laws of the United States, not locally inapplicable, shall have the same force and effect within the State as elsewhere within the United States," does not create any such exception. Such a provision has a less extensive effect within the limits of one of the States of the Union than in one of

the Territories of which the United States have sole and exclusive jurisdiction.

The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. *The Cherokee Tobacco*, 11 *Wall*. 616. Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *The Kansas Indians*, 5 *Wall*. 737. *United States vs. Ward*, *supra*. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as has been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The Courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force.

In United States v. Ward (1 Woolw. 17) in determining the effect of the act admitting Kansas into the Union, upon the provisions of the treaty with the *Kansas Tribe of Indians*, Mr. Justice Miller, at page 22, says:

But there were, at the time of the passage of the act of admission, tribes of Indians within the boundaries of the new State, as described therein, with which the United States had treaties; and in these treaties the government stipulated that their lands should never be brought within the bounds, nor subjected to the jurisdiction, of any State. Among other such tribes we may mention the Shawnees. A treaty had been made with this tribe, giving and assuring to it certain lands: and by the 10th Article it was provided, that "the United States guarantee that said lands shall never be within the bounds of any State or territory, nor subject to the laws thereof". (7 Statutes at Large, 355, 357). It is evident that the Congress which passed the act of admission apprehended the principle above expressed, and foresaw the predicament in which the United States would be placed, if it admitted the State without any provision for such Indians, and for the lands of such Indians, as had treaties containing such a guarantee. It was foreseen that when once Kansas was admitted into the Union upon an equal footing with the original States in all respects whatever, the general government could not protect these obligations.

Accordingly a proviso was annexed to the clause declaring Kansas in the Union. By this proviso, all territory was excepted out of, and was not to be included within, the State, which belonged to a tribe having such a treaty. So that, ecurrring to the case of the Shawnees, their reservation was not in the State. It was within the out-

side boundaries of the State, as described in its Constitution, and yet was without the State, without its jurisdiction and without its territory.

And the converse of this proposition is inferable: that is, that Congress intended to, and did, concede to the new State, and it acquired and holds irrevocably, except as it sees fit to surrender the same, full right and authority to legislate, to enforce her laws, and to exercise plenary jurisdiction, over all such parts of her territory as were not covered by such treaties. Or rather, to express the matter more exactly, all territory which was not covered by such treaties was included within the State, within its jurisdiction and within its territory; and this irrevocably, unqualifiedly, and exclusively.

It remains now to inquire whether the reservation here in question is within the proviso; whether the Kansas tribe of Indians, upon whose reservation this homicide was committed, had such a treaty with the United States, as the Shawnees have been shown to have had, in which it was guaranteed to them by the United States that their reservation should not be brought within any State, nor subjected to its laws. If it had a treaty with such a clause, then the reservation was not in the State, and is subject to Federal jurisdiction. On the other hand, if it had not a treaty with such a clause, then the reservation was within the State, and is subject to State jurisdiction.

This question is to be determined by an examination of the treaty with this tribe, in order to see whether or not in contains such a clause. The

last treaty with the tribe was made in 1859, and ratified in 1860 (12 Statutes at large, 1111), and is before us. We have carefully examined it and find that it does not contain the guarantee mentioned. It is conceded by the counsel for the government, that none exists in any former treaty with this tribe.

It therefore results that the State of Kansas has jurisdiction to try and punish the defendant for the offense set for in this indictment; it follows that we have not jurisdiction.

The appellant's position relating to the repeal of the treaty provision by the subsequent act admitting Wyoming into the Union as a State, may be summarized as follows:

(a) By the admission of the State, Wyoming became the owner of the game and fish within her borders. Thereafter, such game and fish could only be taken at such times and in such manner as the State might determine. This is inconsistent with the treaty provision and works a repeal thereof as to the territory embraced within the new State.

(b) Passing the question of ownership, the State, upon its admission, became possessed of the power to regulate the taking of game and fish, and the act of admission, by reason of which this power was vested in the State, is inconsistent with the treaty provision, if the latter be construed to confer upon the Indians an unlimited or unlimitable right to hunt within the

State. To the extent of the inconsistency the treaty is abrogated.

(c) If the State be not the owner of the game and fish, but be possessed of the police authority to regulate the taking thereof, and the hunting privilege of the Indians be subject to regulation under the police authority, then there is no inconsistency and, consequently, no repeal. In this event, the State having made the regulation, and Race Horse having violated the same, he is amenable therefor.

If a treaty provision, like that in the Cherokee Tobacco case, expressly exempting the Indians from internal revenue taxes, be repealed by a subsequent general law providing for the levy of such taxes; and if a treaty provision, like that in the McBratney case, providing for the police control by the United States of an Indian reservation, be repealed by a subsequent law including the reservation within the exterior boundaries of a new State; then certainly the treaty provision here in question is not sufficient to exclude and withhold from a subsequently admitted State, game and fish, whose ownership by the State is necessary to its admission upon an equal footing with the original States; and neither is such treaty provision sufficient to exclude and withhold from the new State the possession of the police power to protect the game and fish within its borders when the possession of such power by the new State is necessary to its admission upon such equal footing.

When it is remembered that there is nothing in the treaty provision indicating an intent that the hunting privilege of the Indians may be exercised within a State and when it is remembered that there is nothing in the treaty provision indicating an intent that the exercise of the hunting privilege shall not be subject to regulation under the police power, and when it is remembered that the act admitting the new State expressly provides that such State shall be so admitted upon an equal footing with the original States, the superiority and controlling effect of the act of admission becomes obvious.

There is another reason why the act of admission controls the treaty. The country or district in which the hunting privilege can be exercised is, by the terms of the treaty provision, indefinite and subject to change with the changing conditions. The description given in the treaty might well be called a floating one. The country to which it is applicable today may, by its terms, be exempted from its operations tomorrow. The act of admission, on the other hand, operates upon a distinct and well defined territory whose boundaries are not subject to change with the advancing or receding tides of settlement or with the extermination of game or by disturbances which may occur between the Indians and the whites. The definite and enduring territory of the State is, therefore, by the act of admission, carved out of and exempted from the indefi-

nite and floating territory under the operation of the treaty.

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9. *The reasoning and authorities relied upon in the opinion delivered in the Circuit Court by the learned Judge thereof, do not support the judgment rendered.*

The extent of, and limitations upon, the treaty making power, have seldom required or received judicial exposition. The principal cases relied upon in the Circuit Court were those respecting the rights of aliens, under treaty stipulations, to acquire, hold, dispose of and inherit property in the several States. Of these Hauenstein v. Lynham, 100 U. S., 483, is the leading one. Respecting the treaty making power, the Court at p. 490 says:

> There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. It is not the habit of this Court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand. What we have said is sufficient for the purpose of this opinion.

None of these cases are decisive of anything more than that respecting the acquiring, holding, disposing of and inheriting of property, the United States in the

exercise of its treaty-making power may place aliens upon the same footing as citizens of the States. None of the decisions hold that aliens have been or can be exempted from the criminal laws of a State, or that their property has been or can be exempted from the same authority which is exercised by the State over the property of its own people.

It would be contrary to the policy of our government and to the spirit of our free institutions, to extend to aliens privileges not extended to our own people, or to exempt them from the laws which our own people are required to obey.

An alien domiciled or temporarily in the United States, and protected therein by treaty stipulations, is subject to State laws restricting objectionable trades to certain localities, confining of the insane and those afflicted with contagious diseases, restraining vagrants, beggars and habitual drunkards, and prohibiting lotteries and gambling. A privilege granted by treaty to an alien to carry on trade in the United States will be construed to mean a lawful trade lawfully prosecuted. What is true of an alien is equally true of an Indian. Whatever may be the status of Indians living on a reservation separated from the people and property of the State, when those Indians leave the reservation and come in contact with the people of the State, and with the private and public property therein, the necessity for subjecting them to the same laws which are applied to the people

of the State becomes imperative. There cannot be a division of authority here.

Granting that the United States may use the common property of the people thereof in fulfilling its treaty stipulations with foreign nations or Indian tribes, it does not follow that the common property of the people of *a State* may be so used. If the common property of the people of a single State, in which the people of the other States have no interest, may be so used, then we have gone far towards establishing that the private property of a single citizen may be so employed. We refer not to the exercise of eminent domain, where due compensation is made, but to an appropriation without compensation.

The opinion of the learned Judge in the Circuit Court in effect places the protection of public property upon the same level with the exercise of the taxing power, and in this connection cites the cases of the Kansas Indians, 5 Wal., 737, and the New York Indians, 5 Wal., 761, wherein it is held that lands held by Indians under treaty stipulations in the States of Kansas and New York, are not subject to local taxation.

Indian reservations are usually taken from the public lands of the United States, and become an agency in the execution of governmental powers. This would, in most instances, exempt them from taxation. In the Kansas case the lands were protected from taxation by treaty stipulations made before the admission of the

State and in the course of the decision, (5 Wal. 759), the Court says:

> There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property or other rights, which it would have been competent to make if Kansas had not been admitted into the Union.

In the case of the New York Indians, the lands were set apart for the use of the Indians before the establishment of the Federal Government, and had always remained in the possession of the Indians.

Laws exempting property from taxation do not involve a surrender of government, and therefore may be lawfully enacted. If a State may pass such a law after its admission, it may lawfully assent to the same thing as a condition to its admission. The protection of public and private property is a part of government itself, and can not be surrendered, and therefore while it does not impair government to exempt Indian lands from taxation, it does involve a partial withholding of government to withhold from a State the power to protect public and private property within its limits. To say that the United States can deprive a State of the authority to protect public property from destruction or annihilation by Indians, is to say that the same

thing may be done with respect to the protection of private property. Concerning the relation between the surrender of the taxing power and the surrender of the police power, to preserve the public health and the public morals, and to protect public and private property, which is government itself, the Court in Stone vs. Mississippi, 101 U. S., 814, 820, says:

> While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.
>
> But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion

of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

For the reasons given herein, we respectfully submit and urge that the judgment below ought to be reversed and the Circuit Court be directed to enter an order discharging the writ of *habeas corpus* and remanding Race Horse to the custody of the sheriff.

BENJAMIN F. FOWLER and
WILLIS VAN DEVANTER,
For the Appellant.

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CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN H. WARD, SHERIFF OF UINTA County, Wyoming, appellant,
v.
RACE HORSE, APPELLEE.

No. 841.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN H. WARD, SHERIFF OF UINTA County, Wyo., appellant,
v.
RACE HORSE, APPELLEE.

No. 841.

BRIEF FOR APPELLEE.

STATEMENT.

Race Horse, a member of the tribe of Bannock Indians, was arrested by appellant and committed for trial on a warrant issued by the district court of Uinta County, Wyoming, charging him with violation of the game law of that State. He was released on a writ of habeas corpus by the circuit court of the United States for the district of Wyoming, on the ground that the acts charged as the basis of the proceedings against him were done under and by virtue of the provisions of a treaty between the United States and his tribe, proclaimed February 24, 1869 (15 Stat. L., 673), Article IV of which is as follows:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on

> their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Section 6 of the game law of Wyoming (Laws of 1895, pp. 225–232) is as follows:

> The wanton destruction or the wasting of the game and fish of this State during any period of time when the taking or capture of such game or fish is permitted is hereby prohibited and declared a misdemeanor; and any person who shall at any time take, capture, or destroy any game or fish in excess of the number or quantity thereof which he can immediately use for food purposes shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten nor more than fifty dollars, and costs of prosecution, for each and every animal, bird, or fish which he or she may take or destroy contrary to the provisions of this section.

By section 14 it was made unlawful to hunt or kill any deer, elk, etc., except during the months of September, October, and November of each year; hunting by the use of pits, pitfalls, and traps was prohibited at all times; the right during the months named was limited to the killing of male animals required for the purpose of supplying the hunter with food; and it was made unlawful for any nonresident of the State to hunt, even within these restrictions

"without having first procured a license therefor so to do from a justice of the peace of the county wherein said animals are to be hunted. The justices of the peace of this State are hereby authorized and directed to issue such licenses upon the payment of $20 for each license, which shall be good in their county."

Licenses were good for the current year only, and—

"for the purpose of supplying himself or his family with food during such period."

Race Horse admitted in his petition that in July, 1895, he hunted and killed seven elk, as mentioned in the information and complaint on which he was imprisoned, and that the seven elk so killed were in excess of the number he could immediately use for food, but stated that he killed them solely for the purpose of furnishing means of subsistence for himself and family and for other members of his tribe, saving, curing, and preserving their meat for a food supply during the following winter.

He avers that the place where he killed the elk—

"was about 60 miles distant from any ranch or settlement of any kind whatsoever, and was upon the unoccupied lands of the United States of America; that there were no occupied lands or settled lands nearer than 60 miles to the point where said act of killing was done; that at the time of said killing there was wild game in abundance in and upon the lands where said act of killing was done and in the immediate vicinity of said point; that the said lands over which he was at said time hunting constituted and were lands over which the said tribe of Indians had for a great many years last past been in the habit of hunting over and upon; that along and on the borders of said hunting district and of

> said lands over which the said Indians had as aforesaid been in the habit of hunting, peace between the whites and Indians had for many years subsisted and was subsisting and did subsist at the time your petitioner was so, as aforesaid, hunting thereon and at the time he killed the said seven elk mentioned in said complaint." (Record, pp. 2, 3.)

The return admitted that Race Horse was a member of the tribe of Bannock Indians which entered into and concluded the treaty; that he resided on what is known as Fort Hall Indian Reservation, in the eastern part of the State of Idaho, about 60 miles westerly from the western boundary line of Wyoming, and about 100 miles westerly from the place where the elk were killed.

Further—

> "That the said offense with which the said Race Horse is charged as aforesaid was committed on public lands of the United States of America which have not been entered under the land laws of the United States and which have not been settled upon."

The return, however, averred that such lands at that place and in the vicinity thereof had been surveyed, subdivided, and platted by the United States before the time of the killing, and were then and long before had been open to entry and settlement under the land laws of the United States; that a considerable portion of the public land of the United States in the near vicinity of the place, viz, within 5 miles thereof, had been before the offense was committed settled upon and duly entered under the land laws of the United States, and were occupied and used by the persons making such settlements

and entries; that the place where the offense was committed and the country adjacent thereto constituted at the time a part of the State of Wyoming and of the county of Uinta, and was included in and constituted a part of the school and election districts of said county; that the lands where the offense was committed and in the country adjacent which were not then inclosed and fenced by settlers and entrymen thereon were used as an open and common grazing ground for live stock by citizens of the State of Wyoming and of other States, who had live stock in large numbers grazing, running, and ranging thereon, and that such lands and the adjacent country had been at the time divided into round-up districts, pursuant to the laws of Wyoming, and that the cattle ranging thereon were in said and other years rounded up, gathered, and handled according to the long-established custom there, pursuant to the laws of the State. (Record, pp. 8–10.)

The return also admitted that at the time of the offense peace existed between the whites and the Indians, and had existed for many years.

The reply to the return denied that the lands where the elk were killed had been surveyed and platted, or were open to entry and settlement, although a small portion of the lands in the vicinity had been. It also denied that any lands in the near vicinity of the place of killing had been settled, and that there were any ranches or settlements within five miles of it.

It will be seen, therefore, that if the game law of Wyoming applied to Race Horse, he had committed the

offense charged, and that if the right to hunt still existed as secured by the treaty, unaffected by such game law, all the facts showing that Race Horse was entitled to exercise that right are admitted, the only question raised in this regard being whether the place where he killed the elk were "unoccupied lands of the United States."

ARGUMENT.

I.

REMEDY BY WRIT OF HABEAS CORPUS.

I do not understand that any question is made concerning the jurisdiction of the court or the remedy by habeas corpus. The petition alleges, and the return shows that the petitioner was "in custody for an act done or committed in pursuance of a law of the United States," and "in custody in violation of the Constitution or of a law or treaty of the United States." (Rev. Stat., sec. 753; Constitution, Art. III, sec. 2.)

In addition to the cases cited by Judge Riner in his opinion (Rec., p. 31), see *United States ex rel. Standing Bear* v. *George Crook* (5 Dillon, 453), *In re Wong Yung Quy* (47 Fed., 717), *In re Neagle* (135 U. S., 69–75), *In re Barrus* (136 U. S., 592).

II.

UNOCCUPIED LANDS.

The facts found by the court, as stated in the opinion (pp. 31–32), fairly state the effect of the evidence, which was very brief and is set out in record (pp. 21-24). These

are that the elk were killed in a region 30 miles wide by 36 miles long, in which settlers not exceeding seven had established ranches at different places on streams flowing through it, and that cattle owned by residents of Wyoming and other States ranged in the valleys and along these streams; that the entire scope of country is mountainous with occasional valleys, game animals in very considerable numbers being found on the mountains in the timber; that a portion of the lands within this territory had been surveyed, subdivided and platted by the United States, and were open to entry and settlement under the land laws thereof, but that the other portions were unsurveyed; that the elk were killed in the mountains, the only direct evidence being the Indian's; that the place was several miles distant from any ranch or human habitation; that the habits of elk are so well known that when the Indian was asked whether he killed the elk in the open country or in the timber on the mountain, it not only caused him to smile, but also almost every other person seated in the court room, and he very promptly answered that he killed them in the timber on the mountain.

But whether the evidence, the statements of the petition, or those of the return be taken, I do not think it open to debate that the elk were killed on "unoccupied lands of the United States." That phrase is frequently found in the statutes, where it has the same meaning as in common speech. The evidence does not show that the lands upon which the elk were killed were surveyed and platted, or that cattle roamed and grazed thereon; but if this were all true the lands would still

be unoccupied. "To occupy means to hold in possession; to hold or keep for use; as to occupy an apartment—Webster's Dictionary." (*Missionary Society* v. *Dalles*, 107 U. S., 343.) See also 17 Amer. and Eng Ency. of Law, pp. 32 and 33.

I am unable to imagine how the fact that the lands were within the limits of a county of Wyoming can affect the question whether they are occupied or not. "Unoccupied" in the treaty manifestly refers to the absence of private right or possession and not to the absence of political dominion; otherwise there could have been no "unoccupied" lands at the time of the treaty; and the fact that political dominion of a State and county was afterward added to that of the United States could not change the situation.

It is not necessary to resort to rules of construction in so clear a case, although "the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense," Marshall, C. J., in *Worcester* v. *Georgia*, 6 Pet., 515, 582 (see bottom of p. 553 as to meaning of "hunting grounds"), quoted and approved by Mr. Justice Davis in *The Kansas Indians*, 5 Wall., 737, 760.

The construction contended for, if adopted, would make true here what the court said of the treaty in *Hauenstein* v. *Lynham*, 100 U. S., 483, 486: "Otherwise the language used would be a sham and a mockery." (See also p. 487.)

III.

INDIAN RIGHTS UNDER THE TREATY NOT SUBJECT TO REGULATION OR CONTROL BY THE STATE OF WYOMING.

I may fairly assume that it will not be disputed in this court that treaties made by the United States with Indian tribes stand upon the same footing as treaties with foreign nations. (*Worcester* v. *Georgia*, *supra*, 556, 559; *Fellows* v. *Blacksmith*, 19 How., 366, 371.) I assume, also, that it will not be denied that such treaties constitute part of the "supreme law of the land," rights under which are beyond the reach of action by the States. (Constitution, Art. VI; *Fellows* v. *Blacksmith*, *supra*, 372.)

But the contention is, as I understand it, that the rights conferred upon the Indians by the treaty in question must, since the creation of the State of Wyoming, be enjoyed under such restrictions, limitations, and regulations as the legislature of that State may see fit to impose.

It is a matter of current history, of which the court will take judicial notice, that the passage of the game law of Wyoming, especially section 14 which requires a license each year from nonresidents, was passed chiefly for the purpose of preventing the Bannock Indians from enjoying their rights under the treaty. The brutal manner in which it was enforced in the fall of 1895, resulting, as investigation showed, in the wanton killing of several defenseless Indians while under arrest, followed by no

attempt by the State authorities to bring the guilty persons to justice, is matter of common knowledge.

But waiving this, the State law can not in any wise regulate or restrict, any more than it could completely deny, the right of the Indians to hunt as provided in the treaty.

The general rule is stated in *Gibbons* v. *Ogden* (9 Wheat., 1, 210) as follows:

> "In argument, however, it has been contended that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.
>
> But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with or are contrary to the laws of Congress made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress or the treaty is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

Baker et al. v. *Portland*, 2 Fed. Cas., No. 777, p. 472 (5 Sawyer, 566), involved the validity of an act of the

legislature of Oregon, prohibiting the employment of Chinese laborers on the streets and public works of that State. The suit was to enjoin the enforcement of this law by the city of Portland, on the ground that such enforcement would deprive the complainants of their rights under the treaty between China and the United States. The court said (p. 473):

> "This treaty, until it is abrogated or modified by the political department of the Government, is the supreme law of the land, and the courts are bound to enforce it fully and fairly. * * *
>
> "The State can not legislate so as to interfere with the operation of this treaty, or limit or deny the privileges or immunities guaranteed by it to the Chinese residents in this country."

Again (p. 474), after speaking of the difference of opinion as to the wisdom of allowing the Chinese to enter this country—

> "But so far as this court and the case before it are concerned, the treaty furnishes the law, and with that treaty no State or municipal corporation thereof can interfere. Admit the wedge of State interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether."

The latter passage is quoted with approval in *In re* Parrott, 1 Fed. Rep., at p. 517.

Mr. Justice Field sat at the rehearing, and, while the dismissal of the bill on a technical ground—misjoinder of complainants—was affirmed, he assumed that the act was invalid because of the treaty.

In re Parrott, *supra*, was a case which involved the validity of a prohibition by the constitution of Cali-

fornia of the employment of Chinese by corporations of that State. The action was *habeas corpus* by an officer of such a corporation, who was imprisoned for violation of a law passed pursuant to this constitutional provision. His claim was that the constitutional mandate and the law were void because they affected rights under the treaty between the United States and China. The court followed *Baker* v. *Portland*.

The right of the State was traced by the Attorney-General to the police power and the admitted right of the State to control corporations of its own creation. The court said (p. 496):

> "If the effect and purpose of the law be to accomplish an unconstitutional object, the fact that it is passed in the pretended exercise of the police power, or a power to regulate corporations, will not save it."

In *Railroad Co.* v. *Husen*, 95 U. S., 465, 471, in dealing with a statute of Missouri which prohibited the bringing of Texas and other cattle into that State during certain months, the court, through Mr. Justice Strong, said:

> "But whatever may be the nature and reach of the police power of a State, it can not be exercised over a subject confided exclusively to Congress by the Federal Constitution."

In *Henderson* v. *Mayor of New York*, 92 U. S., 259, 271, speaking of a statute of New York imposing burdensome conditions on the landing of foreign passengers, the court, through Mr. Justice Miller, said:

> "Whatever the nature and extent of that (the police) power, where not otherwise restricted, no definition of it and no urgency for its use can au-

> thorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution."

In *The Kansas Indians*, 5 Wall., 737, it was held that the State of Kansas had no right to tax lands held in severalty by individual Indians under patents issued to them by virtue of treaties made with those tribes. While it is true that the act for the admission of Kansas, as well as the organic act for the Territory of Kansas, expressly preserved the rights of the Indians (id., 754), it is evident from the opinion of the court that the same conclusion would have been reached without such provision, which only expressed what would have necessarily been implied. This appears also from the following case, *The New York Indians* (id., 761), in which there was no such feature and in which the court say (p. 769):

> "The question of the taxation of Indian lands while in their tribal organization by the State authorities has been before us this term in several cases from the State of Kansas, and after a very full consideration of the subject the power was denied. We refer to the opinions in these cases as rendering any further examination of the subject unnecessary."

For cases in which treaties have been held to override State laws which would otherwise have applied, see *Ware* v. *Hylton*, 3 Dall., 199, 237; *Chirac* v. *Lessee of Chirac*, 2 Wheat., 259, 276; *Hauenstein* v. *Lynham*, 100 U. S., 483, 488.

It will surely not be contended that the right of a State to regulate the privilege of hunting within its boundaries is higher or broader than its power to tax.

The exercise of each power and of all powers is necessarily restricted by the existence of rights created by the Federal Government under the powers exclusively committed to it. So it is settled that no State may tax franchises conferred by the United States. (*California* v. *Pacific R. R. Co.*, 127 U. S., 1, 41.) All that has been said in this regard in that case and the cases cited therein applies just as strongly to the right of a State to regulate the exercise and enjoyment of any Federal right. The Wyoming law undertakes both to regulate and to tax the treaty rights of the Indians. It would certainly be entirely inconsistent with the fundamental principles of sovereignty, especially those which apply to our dual system of government, to recognize a right on the part of one government in any way to interfere with rights created or conferred by another. So a State can not tax the emoluments of a Federal officer. (*Dobbins* v. *Comrs. of Erie Co.*, 16 Pet., 435, 447.)

The power of Wyoming to regulate hunting and to preserve game within its borders is therefore necessarily confined to persons whose right to hunt is not derived from the Federal Government exercising its exclusive authority, and to game which has passed under the sole dominion of the State. This is the true construction of the law of the State, because the treaties of the United States are as much a part of the law of the State as its own statutes, and both must be construed as *in pari materia*. (*Hauenstein* v. *Lynham*, *supra*, 483, 490.)

If I concede that in ordinary cases Indians are bound to observe the game laws of a State and that game on

unoccupied lands of the United States may become the subject of State legislation, appellant's case is not advanced, because the treaty takes the Indians out of the ordinary as to game on unoccupied lands belonging to the Government.

While a private citizen does not own the game on his own land so as to exclude it from the operation of the game laws of the State, it will hardly be contended that the Federal Government does not have the absolute dominion over the game on its own lands. It may be that in the absence of action by it the laws of the State would apply to such game; but when it does act under its exclusive treaty power the State laws are necessarily excluded.

A State can not interfere with the disposal of public lands within its jurisdiction (*Gibson* v. *Choteau*, 13 Wall., 92, 99), and the right to dispose of the lands include the right to dispose of the right to hunt upon them, as the greater includes the less.

I take it to be unquestionably true that the Federal Government might grant its unoccupied lands within a State to a tribe of Indians and by treaty make such lands a reservation subject to no law save the provisions of the treaty. See *United States* v. *Thomas*, 151 U. S., 577, 584, where the right of Wisconsin to certain sections granted to it by the enabling act was held subordinate to prior treaty rights of the Indians to occupy them. The court said:

> "The State of Wisconsin, therefore, had no such control over that section or right to it as would pre-

vent its being set apart by the United States, with the consent of the Indians, as part of their permanent reservation."

The right to dispose of its own lands does not come within the limitations imposed by the Constitution upon its right to acquire lands within the States. It may therefore dispose of them under the exercise of its power to make treaties with the Indians. If this were not true, the power of the Government to provide for the Indians would cease with the admission of the last Territory as a State. It is not necessary here to sustain this claim. I only make it to set forth more clearly the correctness of my position in this case, viz, that when a State is admitted its authority is necessarily excluded from operating upon treaty rights theretofore conferred upon the Indians by the Federal Government in and upon its own unoccupied lands, so long as those rights continue to exist.

IV.

THE TREATY NOT REPEALED BY THE ENABLING ACT AND THE ADMISSION OF WYOMING THEREUNDER.

It is finally contended by counsel for appellant that the effect of the act providing for the admission of Wyoming as a State, and its admission thereunder, was to repeal the provisions of the treaty so far as they affected unoccupied lands of the United States within the new State.

It is not claimed that the enabling act contains any express provision to this effect, but that such is its necessary implication.

The rule that repeals by implication are not favored applies even more strongly in cases involving treaties than in cases involving statutes. (*Chew Heong* v. *United States*, 112 U. S., 536, 539, 549; *Fong Yue Sing* v. *United States*, 149 U. S., 698, 720.)

The reason is that a treaty is an agreement, while a statute is not, so that intention to set aside a treaty by a statute is less likely than intention to repeal a prior statute.

This reason has greater weight when the treaty has granted rights upon a consideration received by the Government. The Indians, by Section II of the treaty, conveyed property to the United States and received therefor, among other things, the right to hunt of which it is now sought to deprive them. The privilege of hunting is therefore in the nature of a vested right; so that the case differs from one involving a treaty which merely regulates intercourse, etc. The argument now made impugns the good faith of Congress toward the Indians, whom this court has repeatedly held to be wards of the nation entitled to its care and protection in the high degree involved in that relation. (*United States* v. *Kagama*, 118 U. S., 383, 384; *United States* v. *Thomas*, 151 U. S., 577, 585.)

The Government has always recognized the right to hunt as essential to the happiness and welfare of the Indians, and has secured it in most if not all treaties with them.

The treaty with Kiowas and Comanches, Article XI, gave the right to hunt on "any lands south of the

Arkansas River so long as the buffalo may range thereon in sufficient numbers as to justify the chase." (15 Stat., 584.)

To same effect, see treaty with Cheyennes, Art. XI, 15 Stat., 596; treaty with Sioux, Art. XI, 15 Stat., 639; treaty with Crows, Art. IV, 15 Stat., 650; treaty with Northern Cheyennes and Arapahoes, Art. II, 15 Stat., 656; treaty with Navajoes, Art. IX, 15 Stat., 670.

It is a measure of economy also, partly dispensing with the necessity of supplying the wants of the Indians.

Besides, it is a security of peace with the Indians. It is well known that interference with their hunting grounds has frequently been the cause of Indian outbreaks.

In spite of all these considerations, counsel would have us believe that Congress intended by the enabling act to take away the right of the Indians to hunt on unoccupied public lands after the admission of Wyoming.

This intention can certainly not be inferred from the mere absence from the act of any reference to the rights of the Indians unless the provisions of the act and the rights secured by the treaty are positively repugnant. (*Chew Heong* v. *United States*, *supra*.)

As the admission of the State was subject to the Constitution of the United States which gives to the latter the superior and exclusive power to make treaties with the Indians, the argument must go to the extent of denying the power to make subsequent treaties conferring rights to or upon Government lands within the State, or it can not avail to affect such rights already conferred. There can be no greater repugnancy in one case than in the other.

It is true, as claimed, that Territorial and Federal laws relating to the matters committed to the States alone ceased to operate when the State was admitted, because it supplanted the former authority over these subjects. But the admission of the State and the operations of its government are subject to the exercise of the powers of the Federal Government within the sphere of the dominion committed to it. How can there be repugnancy between things which are supplementary to each other?

The phrase used in this, as in all the enabling acts, that the admission is on an equal footing with the other States, has no significance in this connection, because all the States were admitted subject to the exercise of the treaty powers of the United States, and they have been exercised in the States where the presence of Indians made their exercise necessary or expedient. They may be exercised still in any State where the Federal Government owns land. (*United States* v. *Thomas*, *supra*.)

It is no unusual thing for an act of Congress to imply without expressing immunity from State control. (*Tennessee* v. *Davis*, 100 U. S., 257, 264.)

So no inference is to be drawn from the fact that no saving of Indian rights was expressed in the Wyoming enabling act as was done in some others. *Expressio ex majore cautela* never operates as a rule of exclusion in other cases. The St. Regis tribe, as the court remarked in *Fellows* v. *Blacksmith*, *supra*, at page 372, took care to express in their acceptance of the treaty the condition that they were not to be removed to the West. The other tribes did not. Yet the court held that this condition, being implied in the treaty, applied equally to all the tribes.

The Wisconsin enabling act (9 Stat., 56) contained no reservation of Indian rights, yet they were enforced against the State with respect to school sections expressly granted to the State by the act. (*United States* v. *Thomas*, *supra*, 583.)

The test of repugnancy is whether the two provisions can both be carried out. If Congress in the enabling act had expressly saved the treaty rights of the Indians it seems to be conceded that no provision of the enabling act would fail to have full effect. If this is not conceded, then, I inquire, which sentence, clause, or word would have been affected? Repugnancy does not depend on the place where provisions are found, but on their nature and effect. If the treaty and the enabling act could both stand together in the enabling act they can stand together as separate expressions of the will of the United States.

The question seems to me to depend on the self-evident effect of elementary principles.

Respectfully submitted.

JUDSON HARMON,
Attorney-General.

FEBRUARY 29, 1896.

ANSWER TO APPELLANT'S BRIEF.

I have received a copy of the brief for appellants since my own brief was put in type. What I have already said suffices for a general answer, but I add a few comments on matters which I find in the brief.

I.

The passage quoted from the case of *Maguer* v. *The People*, 97 Ill. (Brief, p. 26), serves to bring out the distinction, with respect to the operation of State laws, between the Indians' right to hunt by virtue of a treaty with the United States and the common right. Of the latter the court said:

> No individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare.
>
> Stated in other language, to hunt and kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority—not a right inhering in each individual; and, consequently, nothing is taken away from the individual when he is denied the privilege, etc.
>
> * * * * *
>
> But in any view, the question of individual enjoyment is one of public policy, and not of private right.

This accurately states the case as between the State and those who hold to it merely the relation of citizens. The origin and nature of the privilege of hunting are what justify the State in denying, regulating, or attaching conditions to its exercise. (See *Geer* v. *The State of Connecticut*, just decided by this court.) But it does not describe the case of Race Horse. He has a vested, private right to hunt game on particular lands, which was granted to him by the sovereign power which owned and still owns those lands, in the exercise of its right to make treaties, and in the discharge of its duty to provide for the Indians thereby.

When the Government sells a piece of its unoccupied lands within a State to a settler, it occupies no continuing relation to him. It simply devolves title upon him and leaves him and his land, with all rights resulting from citizenship, to the proper exercise of the State's authority. But when, as the sovereign owner of unoccupied lands, the Government, for a consideration received from the Indians, grants them by treaty the right to hunt upon its lands so long as they are unoccupied and game is found thereon, its relation to the Indians is a different and continuing one. The treaty does not operate like a deed to devolve title and then become *functus officio*. It creates a relation which the Government is constantly bound to protect and enforce, and any interference with which by any other sovereignty is an invasion of its dignity and prerogative, as well as an interruption to the discharge of one of its functions. So that while it may be conceded that if Race Horse had killed the deer on other

than unoccupied lands of the United States, the State law would have applied, because he would then have been exercising the common right, that law did not apply to his killing them where he did because he killed them by virtue of an entirely different right, which was beyond the State's control.

II.

An extract is given from the case of *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. (Brief, p. 35). I do not perceive the bearing of that case, which dealt only with the question of Federal jurisdiction over a tract ceded to the Government by the State. Speaking of the inadvertence which had led to the failure of the Government to reserve its military reservation from State jurisdiction, the court used the language quoted, but even then was careful to express the exception which covers the case at bar: "The United States, therefore, retained (over its military reservation) only the rights of an ordinary proprietor; *except as an instrument for the execution of the powers of the General Government*," etc. (p. 527). See also p. 531.

As I have already shown, one of the purposes of the General Government is to provide for the Indians. It may give them complete control of its land by making it a regular reservation; *a fortiori*, it may give them any less right therein or thereon. While Government land is subjected to such Indian right, it is being used as "an instrument for the execution of the powers of the General Government," and therefore is not subject to State regulation or control.

In other words, in this case the United States, being then the sovereign which not only owned the land but also held in trust as common property all the game thereon, granted to the Indians by treaty the right to such game as they might be able to take upon those lands while unoccupied. To this extent, therefore, the game on unoccupied Government lands was encumbered or disposed of by the sovereign power before the State of Wyoming came into existence, and the latter received it from the United States as it then existed.

The court will appreciate the naïveté of the remarks (Brief, p. 52) about the danger of extermination of game by the Indians. Though they have always subsisted upon them, no instance was ever known of the wanton destruction of game animals by Indians; but all game, from the mighty buffalo to the most insignificant bird, is rapidly nearing extermination under the destructive chase of the white man. Yet counsel, who must know this, do not seem to perceive its bearing on their plea for the preservation of the game of Wyoming.

III.

The Cherokee Tobacco, 11 Wall., 616, is cited (Brief, p. 80). The court held that a law of Congress imposing a tax on all tobacco produced anywhere within the limits of the United States operated to repeal a treaty with the Cherokees exempting them from taxation on farm products. It is difficult to see how the terms of the statute and the exemptions of the treaty could both have been given effect. I do not understand

the purpose of this citation, as the power of Congress to repeal a treaty by a subsequent statute, either express or absolutely repugnant, has never been denied.

IV.

Counsel quote extensively from *United States* v. *McBratney*, 104 U. S. (Brief, p. 81), but Mr. Justice Gray was careful in that case to prevent its being used as counsel now seek to use it. His language seems to have been specially chosen to that end. The case involved merely the question of Federal jurisdiction of an offense committed by one white man upon another on an Indian reservation in Colorado. As counsel say, "the subsequent act admitting Colorado into the Union contained no exception of the Ute Reservation or of jurisdiction over it." (Brief, p. 81.) The court held, therefore, that the State alone had jurisdiction of the offense, but said what counsel omit from their quotation, breaking a paragraph at this very point, "But that treaty contains no stipulation for the punishment of offenses committed by white men against white men."

The language used by the court (bottom of p. 623), viz, "whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words," must therefore be taken to apply only to cases relating to general jurisdiction, not to cases involving treaty rights. This is further shown by the fact that the learned justice also took pains to say at the end of the opinion, "The

record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements," etc.

United States v. *Ward*, 1 Woolw., 17, also related merely to general jurisdiction; and what Mr. Justice Miller said (quoted brief, p. 84) must be taken as applied to that only or it would be in conflict with *United States* v. *Thomas*, 151 U. S., 577. The rights which Congress foresaw the General Government could not protect, if Kansas should be admitted without exception or reservation, were the guaranties in treaties with the Indians against their lands being included within any State or subjected to any State laws. Of course, if Congress should create a State, naming boundaries which embraced Indian lands, it would thereby expressly destroy these guaranties. So in the case of Kansas it excepted lands covered by such treaties, and the only question before the court was whether the place where Ward's offense was committed was within such excepted lands or not. Again, no treaty rights were involved. Ward was a white man and his offense was against a white man.

United States v. *Stahl*, *Id.*, 192, was a similar case.

Of course, both State and Nation can not both have general jurisdiction over the same territory. The purpose of an enabling act is to transfer this from the latter to the former, leaving in the latter only its limited Federal judisdiction. Unless exception or reservation is made, jurisdiction over the entire territory described in the act passes to the State.

But what appellant must establish is that such transfer affects all Federal rights by either destroying them altogether or subjecting them to the sole power of the State. It clearly does not, and can not do this, because these rights pertain to the jurisdiction which the United States must retain, and not to that which is the subject of the transfer. Therefore, it is never necessary to mention mere personal rights in an enabling act, and if they are mentioned it is merely out of excess of caution. These do or do not become subject to the exercise of ordinary State powers according to their nature and origin; and the same principle which deprives the courts of the State of the right to pass upon rights of Federal nature and origin deprives its legislature of power to restrict, regulate or annul them. They are not affected by the transfer to the State of general jurisdiction for State purposes of the Territory within which they are enjoyed.

V.

A number of cases are cited, like *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 659, and *Barbier* v. *Connolly*, 113 U. S., 27, involving the relation of charter or general rights protected by the fourteenth amendment to the police power of the State. Their entire inapplicability here seems to me clear without argument.

The same is true of *Stone* v. *Mississippi*, 101 U. S., 814, which held that while the State might create a valid exemption from taxation, it could not surrender its power

to protect public health, morals, etc. Is it contended that the right to pass game laws comes within this principle?

Surely the State, in selling its own lands, might give the buyer the unrestricted right to hunt thereon. Therefore it is no diminution of its sovereign dignity to hold it bound by the grant of this right to the Indians by its sovereign predecessor.

What I have said also distinguishes this case from those involving the right of States (Brief, p. 90) to enforce their laws for the protection of public health and morals against aliens found within them, although such aliens are protected (not in these respects) by treaty stipulations. If Race Horse had indulged too freely in the "fire water," with which his pale-faced brother is always willing to supply him, or had committed an assault or any other offense while engaged in exercising his right to hunt on lands of the Government, no doubt he might have been lawfully punished by the State. But the point is that the State can not punish him merely for hunting on such lands, because in so doing he is the ward of a higher power.

So in *State of New York* v. *Dibble* (21 How., 366) a statute of New York was held valid which forbade white persons from settling on Indian lands, etc. The ground of the opinion is that the act was not "in conflict with rights acquired * * * under the treaty and contract making part of it" (p. 370).

So, also, State laws of health, order, morality, etc., apply to persons and property engaged in interstate com-

merce, though a State can require no license for the privilege of engaging in such commerce and make no regulation thereof.

Respectfully submitted.

JUDSON HARMON,
Attorney-General.

MARCH 5, 1896.